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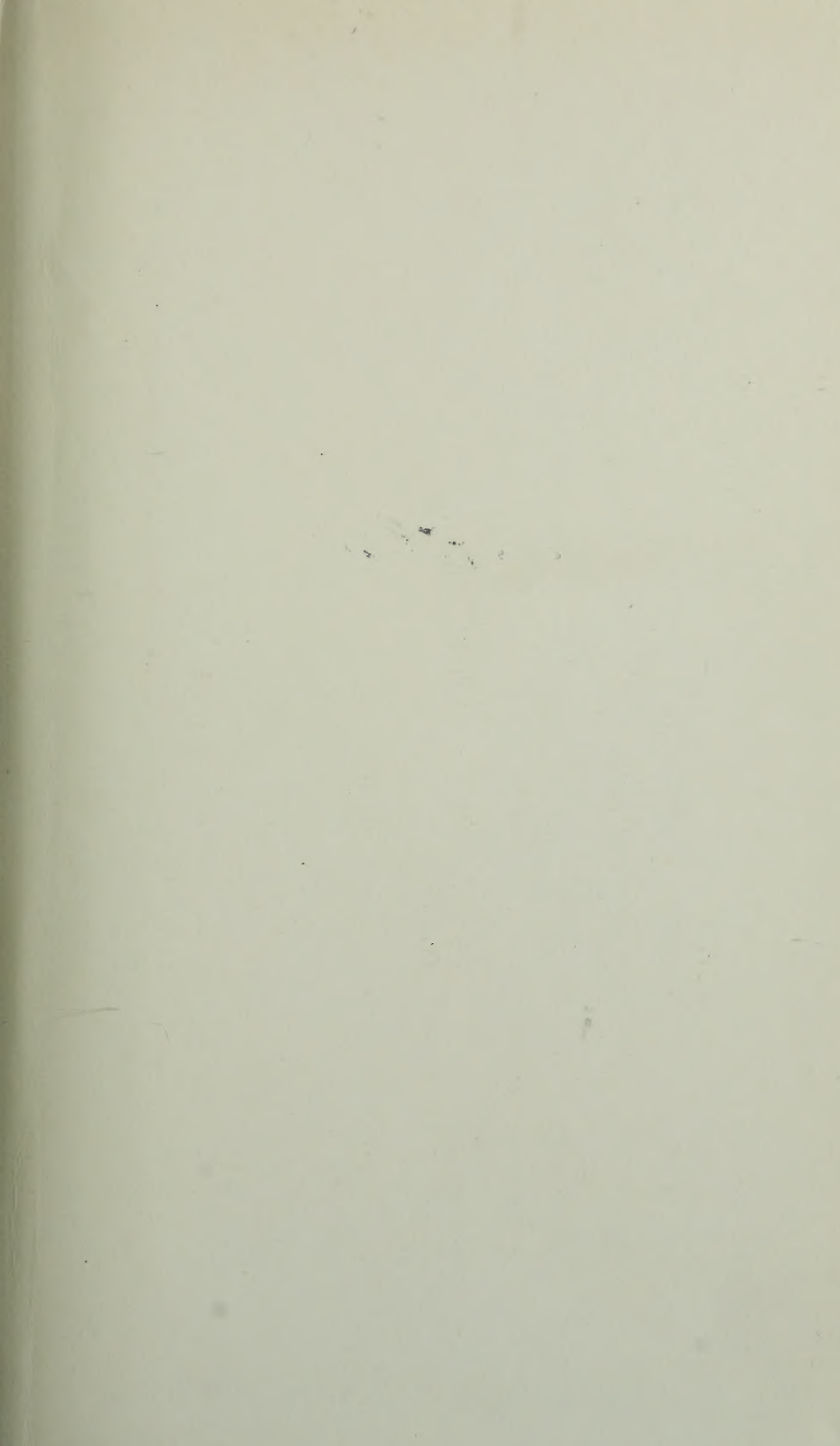
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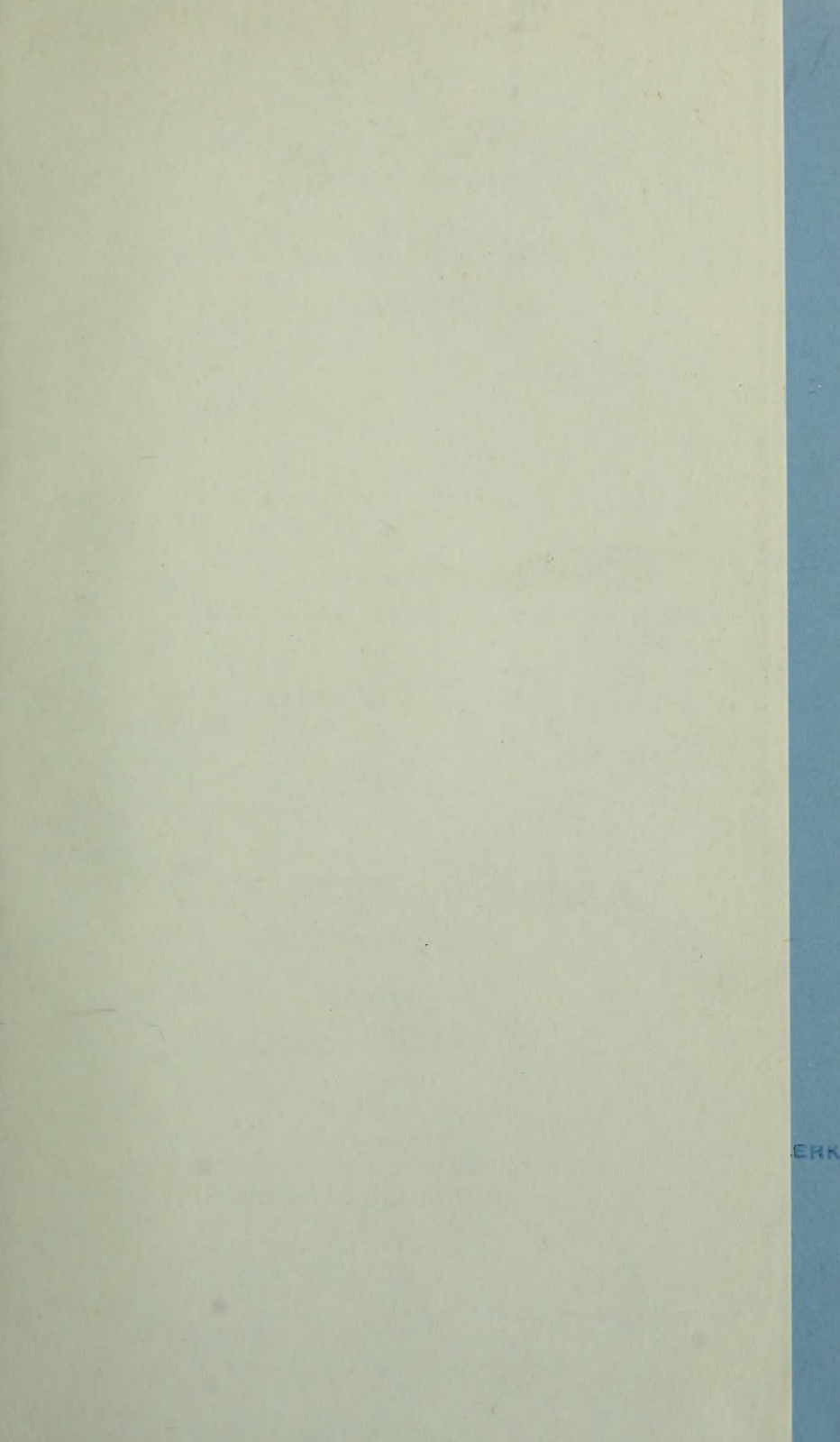
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No. 12591

2650

United States
Court of Appeals

For the Ninth Circuit.

me 12649

JOHN H. FAHEY, et al.,

Appellants,

vs.

O'MELVENY & MYERS, W. I. GILBERT, JR., and RICH-
ARD FITZPATRICK,

Appellees.

and

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

O'MELVENY & MYERS, W. I. GILBERT, JR., and RICH-
ARD FITZPATRICK,

Appellees.

Transcript of Record

In Two Volumes

Volume II

(Pages 397 to 876)

FILED

JUN 18 1951

PAUL P. O'BRIEN,

CLERK

Appeal from the United States District Court,
Southern District of California,
Central Division.

No. 12591

United States
Court of Appeals
For the Ninth Circuit.

JOHN H. FAHEY, et al.,

Appellants,

vs.

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ARD FITZPATRICK,

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Transcript of Record
In Two Volumes
Volume II
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Appeal from the United States District Court,
Southern District of California,
Central Division.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

Memorandum of Points and Authorities

1. It is well established that a trial court has discretion to allow reasonable fees out of corporate funds to counsel employed to resist in good faith the appointment of a receiver or conservator for a corporation.

Ex Parte Fahey (Civil Action No. 5421-PH), writ of mandamus and/or prohibition and/or injunction denied (1947), 91 L. Ed. Adv. Op. 1582 (interim allowance [125] of fees; See *Anderson v. Great Republic Life Insurance Co.* (1940), 41 Cal. App. (2d) 181 (Interim allowance of fees);

even though such resistance ultimately proves unsuccessful.

Pickrel, Schaeffer & Ebeling v. Merion (Ohio), App. (1943), 66 N. E. (2d) 273; See *Caminetti v. State Mutual Life Insurance Co.* (1942), 52 Cal. App. (2d) 326, 327; See *Barnes v. Newcomb* (1882), 89 N. Y. 108, 115-116.

2. The reason underlying the allowance of fees in such cases is that since all the funds of the corporation are in the hands of the receiver or conservator, a denial to the corporation of the use of any portion of such funds with which to pay attorneys' fees would in effect deny the company the right to counsel and hence to due process of law.

Ex Parte Fahey (*supra*);

Anderson v. Great Republic Life Insurance Co. (*supra*), at p. 193.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

It is submitted that both the principle and the reasoning of these cases are equally applicable to the instant case where all the assets of Los Angeles Bank are in the hands of the purported San Francisco Bank and consequently a denial to Los Angeles Bank of the use of any portion of such assets with which to pay its attorneys would in effect preclude it from [126] testing the validity of the purported Federal Home Loan Bank Administration orders under which it was deprived of all of its assets and properties.

3. In so far as the allowance of counsel fees is concerned, the instant case is analogous to a suit for divorce or separate maintenance wherein it is discretionary with the court to allow interim costs and attorneys' fees to the wife for the prosecution or defense of the litigation even in the absence of a statute authorizing such an allowance.

Madden, *Persons and Domestic Relations* (1931), Sec. 98, pp. 325-326; 17 Am. Jur. 448, 449;

Smiley v. Smiley (1925), 136 Wash. 241; 239 Pac. 551.

4. The stockholders of a corporation are the equitable owners of its assets, and they have a proprietary interest in the corporation.

11 Fletcher Cyc. of Corps. (Rev. and Perm. Ed., 1932), p. 93, and cases cited in footnotes 8 and 9.

Petitioners' Exhibit No. 2-27-50-2—(Continued)
Plaintiff associations, representing themselves and other stockholders of Los Angeles Bank, are seeking an allowance for reasonable attorneys' fees out of properties and assets which equitably belong to them in order to prosecute their suit to recover such properties and assets.

5. See also generally: [127]

Sprague v. Ticonic National Bank (1939),
307 U. S. 161;

Trustees v. Greenough (1881), 105 U. S. 527;

Winslow v. Harold G. Ferguson Corp. (1944),
25 Cal. (2d) 274.

Affidavit of Pierce Works and John Whyte in
Support of Application for Attorneys' Fees

State of California,

County of Los Angeles—ss.

Pierce Works and John Whyte, being first duly sworn, depose and say: That Pierce Works is and at all times herein mentioned was a partner in, and that John Whyte is and at all times herein mentioned was associated with, the law firm of O'Melveny & Myers, 433 South Spring Street, Los Angeles 13, California; that they are, and each of them is, and at all times herein mentioned was, a duly admitted and qualified attorney and counselor at law and practicing as such in and before the above-entitled court; and that the facts herein stated are within the personal knowledge of either or both of said affiants.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

1. For purposes of brevity, and to avoid [128] repetition, affiants hereby adopt and restate herein by reference each and every allegation set forth in Paragraphs 2, 29, 30, 31, 32, 33 and 34, and each of them, of the complaint on file herein in Civil Action No. 5678-PH (WM).

2. On and prior to March 29, 1946, Los Angeles Bank was carrying on the normal and usual business and functions of a Federal Home Loan Bank at Los Angeles, California, with assets as of said date in excess of \$45,000,000.00. On said date, pursuant to the terms of purported Federal Home Loan Bank Administration Order Nos. 5082, 5083 and 5084, purportedly issued on said date by defendant John H. Fahey, as chairman of the Federal Home Loan Bank Board and purportedly serving as Federal Home Loan Bank Commissioner, said Los Angeles Bank was purportedly liquidated, reorganized and dissolved, all of its assets and properties were then and there seized by said defendant and purportedly transferred to and were physically taken possession of by the Federal Home Loan Bank of Portland (hereinafter sometimes referred to as "Portland Bank"); all liabilities and obligations of said Los Angeles Bank were purportedly assumed by Portland Bank, Portland Bank was ostensibly moved to the City and County of San Francisco, California; the name of said Portland Bank was purportedly changed to that of "Federal Home Loan Bank of San Francisco" (hereinafter

Petitioners' Exhibit No. 2-27-50-2—(Continued)
sometimes referred to as “the purported San Francisco Bank”), and ever since said date Portland Bank has been [129] purportedly transacting business in California and elsewhere under the name of “Federal Home Loan Bank of San Francisco” with the commingled assets of Los Angeles Bank and Portland Bank.

3. On or about April 1, 1946, Los Angeles Bank, pursuant to a resolution duly adopted by its Executive Committee at a duly held meeting thereof, employed the firm of O'Melveny & Myers and Paul Fussell, Esq., of said firm, and Richard FitzPatrick, Esq., attorneys-at-law of Los Angeles, California, (a) to consider the purported orders hereinabove mentioned in Paragraph 2, and the actions purportedly taken pursuant thereto by the Federal Home Loan Bank Administration, its officers, attorneys, agents and employees; (b) to consider the rights of Los Angeles Bank, the Board of Directors of said Bank and the members thereof, with respect to said purported orders and actions; (c) to consider the rights of the stockholders of said Bank with respect to said purported orders and actions; (d) to advise what actions, suits or proceedings said parties, or any of them, may, can or should take to protect their respective rights; and (e) to bring such actions, suits or proceedings in state or Federal courts in the State of California, or elsewhere, as said attorneys determine to be proper, and otherwise to assist said parties in the protection of their rights and interests.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

4. On April 2, 1946, the Board of Directors of Los [130] Angeles Bank at a duly held meeting thereof duly approved, ratified and confirmed the action of the Executive Committee in adopting the resolution hereinabove referred to in Paragraph 3. By resolution duly adopted said Board of Directors further appointed a committee **from among their number**, which said committee was thereby authorized and directed to take any **and all actions, steps and proceedings** which they might deem proper, necessary, expedient or advisable to protect the rights and interests of Los Angeles Bank and of its stockholders and members, and to resist all actions purportedly taken pursuant to purported Order Nos. 5082, 5083 and 5084, respectively, of the Federal Home Loan Bank Administration.

5. Pursuant to said employment hereinabove referred to in Paragraphs 3 and 4, Messrs. O'Melveny & Myers, of which firm Paul Fussell, Esq., is and at all times herein mentioned was a partner, in cooperation with Richard FitzPatrick, Esq., began the necessary preliminary legal work looking toward the commencement of an action for the primary purpose of restoring to Los Angeles Bank the possession of its assets and properties and the financing of such an action by the stockholders of said Bank, the nature of such legal work performed by Messrs. O'Melveny & Myers being more particularly herein-after set forth in Paragraph 9.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

6. On June 12, 13 and 14, 1946, upon complaints of Los Angeles Bank and Long Beach Federal Savings and Loan [131] Association, and pursuant to House Resolution 88, a hearing was held before the Select Committee to Investigate Executive Agencies of the House of Representatives, Seventy-ninth Congress, Second Session, with respect to the purported liquidation, reorganization and dissolution of Los Angeles Bank on March 29, 1946, pursuant to purported Federal Home Loan Bank Administration Order Nos. 5082, 5083 and 5084, and the appointment of a conservator for said Long Beach Federal Savings and Loan Association of May 20, 1946, following which said hearing said Committee published its Tenth Intermediate Report, being House Report No. 2659, recommending, among other things, that defendant John H. Fahey herein in his then capacity as purported Federal Home Loan Bank Commissioner "take all necessary steps to re-establish a Federal Home Loan Bank of Los Angeles and a Federal Home Loan Bank of Portland, and revoke the order or orders by which the assets of these two district banks were intermingled."

7. In or about July and August, 1946, Coast Federal, Standard Federal, First Federal, Central, State and Los Angeles American, and each of them, by appropriate resolutions of their boards of directors, and each of them, employed and retained Messrs. O'Melveny & Myers and Richard Fitz-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
Patrick, Esq., attorneys-at-law of Los Angeles, California, (a) to consider purported orders of the Federal Home Loan Bank Administration dated March 29, 1946, numbered 5082, 5083 and [132] 5084, respectively, and any other orders of said Federal Home Loan Bank Administration which they deem pertinent, and any actions taken or purportedly taken pursuant thereto by the Federal Home Loan Bank Administration, its officers, agents, attorneys or employees; (b) to consider the rights of each said association as a stockholder of the Federal Home Loan Bank of Los Angeles with respect to said purported orders and actions; (c) to advise what actions, suits, proceedings or other steps each said association may, can or should take to protect its rights; (d) in behalf of each said association, to institute, defend, intervene in or otherwise appear and participate in such actions, suits or proceedings in the Federal or state courts, either in the State of California, or elsewhere, as said attorneys made determine to be appropriate; and (e) generally to take such action (whether like or unlike the foregoing) as said attorneys may deem appropriate to protect the rights and interests of each said association.

8. On August 22, 1946, Los Angeles Bank, Coast Federal, Standard Federal, First Federal, Central, State and Los Angeles American, suing on behalf of all similarly situated members and stockholders of Los Angeles Bank, by and with the advice and consent of Messrs. O'Melveny & Myers and Richard

Petitioners' Exhibit No. 2-27-50-2—(Continued)

FitzPatrick, Esq., their attorneys, commenced that certain action, now designated upon the files of the above-entitled Court as Civil Action No. 5678-PH (WM), reference to the [133] complaint in said action being hereby made for further particulars as to the nature and purpose thereof. Said action is now pending and undetermined in the above-entitled Court, and ever since the commencement of said action Messrs. O'Melveny & Myers and Richard FitzPatrick, Esq., have continued to represent and are still representing plaintiffs, and each of them, in said action and in all proceedings therein and expect to represent plaintiffs, and each of them, until said action is concluded, either by a judgment of the above-entitled Court following a trial thereof on the merits, or by an appeal or appeals from said judgment, or by settlement, or otherwise.

9. The legal services necessarily performed by Messrs. O'Melveny & Myers from and after April 1 and 2, 1946, being the dates of employment of said Messrs. O'Melveny & Myers referred to in Paragraphs 3 and 4 hereof, to and including October 31, 1948, in connection with the prosecution of said Civil Action No. 5678-PH (WM) on behalf of plaintiffs, and each of them, have been as follows:

The number of hours spent in connection with said action on behalf of plaintiffs herein between said dates is 828 hours of attorneys' time and 162½ hours of stenographers' time. Attached hereto, marked Exhibit A and made a part hereof, is a

Petitioners' Exhibit No. 2-27-50-2—(Continued) schedule showing the time spent by each individual attorney, whether such services were rendered in court or in office [134] work, or in both, and the total hours in each of such classifications so spent by each individual. Said schedule also shows whether each of said individuals is a partner in the firm of O'Melveny & Myers or an employee thereof.

As a summary, the total of 828 hours of attorneys' time spent by Messrs. O'Melveny & Myers is made up as follows:

	Court Time	Office Time	Totals
Partners	21½	160	162½
Employees	3	662½	665½
Totals.....	51½	822½	828

The hours stated above and under Exhibit A are based on daily time sheets kept by attorneys and stenographers in the offices of O'Melveny & Myers.

The general nature of said legal services has been as follows:

March and April, 1946.

Conferences with executive committee and with members of the board of directors of Los Angeles Bank, preparation for and attendance at meetings of executive committee of California Savings and Loan League and stockholders of Los Angeles Bank, examination of Security Owners Protection Act, preparation of application to the Corporation Commissioner, conferences with Mr. FitzPatrick and research in connection with the above-mentioned

Petitioners' Exhibit No. 2-27-50-2—(Continued)
matters, drafting opinion re right of stockholders of Los Angeles Bank to contribute to Federal [135] Home Loan Bank Stockholders' Committee and research and conferences with Mr. FitzPatrick in connection therewith, attendance at meeting of Federal Home Loan Bank Stockholders' Committee, examination of factual background of proposed suit against John H. Fahey, purportedly serving as Federal Home Loan Bank Commissioner, research re venue of said proposed action, examination of opinion of Washington, D. C., attorneys re said proposed action.

May, 1946.

Attendance at meeting of Federal Home Loan Bank Stockholders' Committee, study of file re proposed suit against purported Federal Home Loan Bank Commissioner, study of Federal Home Loan Bank Act, preparation of outline of complaint, study of rules and regulations of Federal Home Loan Bank System, drafting of complaint, trip by Mr. Whyte to Fresno and attendance at meeting of members of the California Savings and Loan Industry for purpose of explaining proposed lawsuit.

June, 1946.

Conferences with Mr. FitzPatrick, and with attorneys for other litigants, attendance at meetings of Federal Home Loan Bank Stockholders' Committee, research and preparation of memorandum re application of Section 57 of the Judicial Code, 28 U.S.C., Sec. 118.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

July, 1946.

Conferences with Mr. FitzPatrick, with Mr. Berry, and [136] with attorneys for other litigants, study of transcript of hearing before Committee of House of Representatives to Investigate Acts of Executive Agencies, research re problems incident to preparation of complaint, revision of complaint.

August, 1946.

Revision of complaint, research re service of process, preparation of summons and order for publication thereof, details incident to filing and service of summons and order, including court appearance in connection with the order, conferences with Mr. FitzPatrick.

September, 1946.

Research re possible denial of due process under Section 26 of the Federal Home Loan Bank Act, studying report of Congressional Committee, research and preparation of memorandum re constitutionality of Section 26 of the Federal Home Loan Bank Act, conferences with Mr. FitzPatrick and with Mr. Berry.

October, 1946.

Conferences with Mr. FitzPatrick re constitutionality of Section 26 of the Federal Home Loan Bank Act and other matters, study of defendant Fahey's motion to dismiss complaint, including analysis of his points and authorities.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

November, 1946.

Preparation of memorandum analyzing defendant Fahey's motion to dismiss complaint, research re Los Angeles Bank's opposition to motion to dismiss complaint, study of motions [137] of Portland Bank attacking complaint and reading and briefing of authorities cited in support thereof, research and preparation of memorandum re United States as indispensable party defendant to lawsuit, conferences with Mr. FitzPatrick.

December, 1946.

Reading and abstracting cases cited in support of Portland Bank's motion attacking complaint, trip to Long Beach and conference with attorneys for other litigants, attendance at meetings of Federal Home Loan Bank Stockholders' Committee, conferences with Mr. FitzPatrick.

August, 1947.

Consideration of effect of President Truman's Reorganization Plan 3 upon parties defendant, research and consideration of problems re substitution of parties defendant under Rule 25(d) F.R.C.P., conference with Mr. FitzPatrick and attorneys for other litigants re joining of new defendants, drafting moving papers re substitution of parties defendant, conferences with Mr. FitzPatrick.

September, 1947.

Revision of moving papers re substitution of parties defendant, checking Federal Register for

Petitioners' Exhibit No. 2-27-50-2—(Continued)
data re membership of Home Loan Bank Board,
conferences with Mr. FitzPatrick and attorneys for
other litigants.

October, 1947.

Conferences with Mr. FitzPatrick and attorneys
for other [138] litigants, revising moving papers re
substitution of parties defendant, obtaining order
for service of substitution papers and details inci-
dent to service.

November, 1947.

Preparing memorandum of points and authorities
in opposition to motions of defendants Fahey and
Portland Bank attacking complaint and research in
connection therewith.

January, 1948.

Conferences with members of the legal depart-
ment of Title Insurance and Trust Company,
preparing for argument resisting motions of de-
fendants Fahey and Portland Bank attacking
complaint and court appearance re said motion,
research re definition of indispensable party, con-
ferences with Messrs. Eason and FitzPatrick, com-
posing letter to Mr. Eason re status of numerous
motions to be heard on March 22, 1948.

February, 1948.

Examination of proposed resolution to be adopted
by Home Loan Bank Board reconstituting Los
Angeles Bank and conferences with Mr. FitzPatrick
and with certain members of the Federal Home

Petitioners' Exhibit No. 2-27-50-2—(Continued)
Loan Bank Stockholders' Committee concerning the
same.

March, 1948.

Conferences with Mr. FitzPatrick and attorneys
for other litigants, conferences with member of
legal department of Title Insurance and Trust
Company. [139]

May, 1948.

Conference with Irving Bishop, examination of
answer of the proposed San Francisco Bank and
research thereon, gathering information necessary
for substitution of new defendants and preparation
of moving papers therefor, research re possibility
of enjoining the purported San Francisco Bank
from spending Los Angeles Bank's funds, confer-
ences with Mr. FitzPatrick.

June, 1948.

Research re possibility of enjoining the proposed
San Francisco Bank from spending Los Angeles
Bank's funds, conferences re substitution papers,
attendance at meeting of Federal Home Loan Bank
Stockholders' Committee, revision of letter to direc-
tors of the purported San Francisco Bank, confer-
ences with Mr. FitzPatrick.

July, 1948.

Conferences with Mr. FitzPatrick re San Fran-
cisco suit of ten Bay Area savings and loan asso-
ciations.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

August, 1948.

Conferences with certain members of the Federal Home Loan Bank Stockholders' Committee.

September, 1948.

Conferences with Mr. FitzPatrick, studying draft of resolution for re-establishment of Los Angeles Bank prepared by Mr. McKenna. [140]

October, 1948.

Conferences with Mr. FitzPatrick, with attorneys for other litigants, and with certain members of the Federal Home Loan Bank Stockholders' Committee re proposed hearing in Washington, D. C., to consider reestablishment of Los Angeles Bank.

During each of the above-mentioned months there were conferences among various partners and employees of the law firm of O'Melveny & Myers with respect to the matters set forth above. Furthermore, no attempt has been made to itemize the voluminous correspondence and numerous telephone calls regarding such matters which took place over the above-mentioned period.

The legal services necessarily performed by Messrs. O'Melveny & Myers from and after October 31, 1948, to and including the date of filing hereof, have not as yet been calculated.

10. In addition it is contemplated that Messrs. O'Melveny & Myers and Richard FitzPatrick, Esq., will necessarily be required to perform additional legal services in connection with the future conduct

Petitioners' Exhibit No. 2-27-50-2—(Continued) of Civil Action No. 5678-PH (WM) on behalf of plaintiffs, and each of them. Said contemplated future services will consist in general of preparation for trial, including the taking of depositions of certain officials of the Federal Home Loan Bank Administration [141] on and prior to March 29, 1946, and others, some or all of said depositions to be taken in parts of the United States other than California, the assembling of voluminous factual and documentary material to support the allegations of the complaint, the interviewing of numerous witnesses to be called on behalf of plaintiffs, research of questions of law, and the preparation of a trial brief covering both the facts expected to be proved and the law applicable thereto; the trial itself which may last as long as three or four months; the preparation of findings, judgments or orders of the above-entitled Court following said trial; the taking or resisting of appeals from said judgments or orders; etc.

11. On or about May 20, 1946, John H. Fahey, as Chairman of the Federal Home Loan Bank Board and purportedly serving as Federal Home Loan Bank Commissioner, purportedly appointed A. V. Ammann as purported conservator for the Long Beach Federal Savings and Loan Association (hereinafter sometimes referred to as "Long Beach Association"), and said A. V. Ammann and his deputies did then and there take immediate possession and control of said association, including all of its assets aggregating in excess of \$26,000,000.00.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

12. Thereafter, on May 27, 1946, Paul Mallonee, C. H. Newhouse and Winnie Bucklin, individually, and as representatives of a class, suing for and on behalf of all of the shareholder members of Long Beach Association, commenced an action [142] in the above Court, now designated upon the files of said Court as Civil Action No. 5421-PH, against John H. Fahey, individually, John H. Fahey, as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, individually, A. V. Ammann, as purported conservator for Long Beach Association, Long Beach Association, an association organized and existing under and by virtue of the laws of the United States, and numerous Does, seeking, among other things, to oust the conservator and to restore possession of the property and assets of said association to its officers and directors.

13. On July 1, 1946, Los Angeles Bank became a third-party defendant in said action by the filing as against it and others of the third-party complaint of defendant Long Beach Association. On August 26, 1946, Los Angeles Bank became a cross-claimant in said action by the filing of its cross-claim against Federal Home Loan Bank of Portland, sometimes known and referred to as Federal Home Loan Bank of San Francisco, a body corporate, John H. Fahey, individually, and John H. Fahey, as Chairman of the Federal Home Loan Bank Board and purportedly serving as Federal Home Loan Bank Commissioner, which said cross-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
claim sought to obtain a judgment similar to that sought by the complaint in Civil Action No. 5678-PH (WM). On December 9, 1947, Los Angeles Bank became a defendant in said action by the filing as against it and others of the first amended and supplemental complaint of [143] plaintiffs hereinabove named in Paragraph 12. On May 28, 1948, Los Angeles Bank became a cross-defendant in said action by the filing as against it and others of the supplemental cross-claim to amended cross-claim of defendant and third-party plaintiff Long Beach Association.

14. On November 7, 1947, the above-entitled Court made and entered an order consolidating Civil Action No. 5678-PH (WM) with Civil Action No. 5421-PH.

15. The legal services necessarily performed by Messrs. O'Melveny & Myers from and after April 1 and 2, 1946, being the dates of employment of said Messrs. O'Melveny & Myers referred to in Paragraphs 3 and 4 hereof, to and including October 31, 1948, in representing Los Angeles Bank in its varying capacities or potential capacities as a defendant, third-party defendant, cross-claimant or cross-defendant in Civil Action No. 5421-PH, have been as follows:

The number of hours spent on behalf of Los Angeles Bank in said action between said dates is 806 hours of attorneys' time and 242½ hours of stenographers' time. Attached hereto, marked Ex-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
 Exhibit B and made a part hereof, is a schedule showing the time spent by each individual attorney in connection with said action, whether such services were rendered in court or in office work or in both, and the total hours in each of such classifications so spent by each individual. Such schedule also shows whether each of said individuals is a [144] partner in the firm of O'Melveny & Myers or an employee thereof.

As a summary, the total of 806 hours of attorneys' time spent by Messrs. O'Melveny & Myers is made up as follows:

	Court Time	Office Time	Totals
Partners	8	149	157
Employees	671½	581½	649
Totals.....	751½	730½	806

The hours stated above and under Exhibit B are based on daily time sheets kept by attorneys and stenographers in the office of Messrs. O'Melveny & Myers.

The general nature of said legal services has been as follows:

July, 1946.

Study of third-party complaint filed against Los Angeles Bank and conferences with attorneys for other litigants in connection therewith, study of complaint of shareholders of Long Beach Association, conferences with Mr. FitzPatrick and with Mr. Berry regarding these matters, attendance before three-judge statutory court re argument over

Petitioners' Exhibit No. 2-27-50-2—(Continued)
constitutionality of Section 5 of the Home Owners
Loan Act.

September, 1946.

Study of decision of three-judge statutory court,
conferences with Messrs. FitzPatrick and Berry re
form of said court's decree and study of de-
cree. [145]

October, 1946.

Research in connection with decision and decree
of three-judge statutory court.

December, 1946.

Consideration of questions to be decided by
United States Supreme Court on appeal from de-
cision of three-judge statutory court, study of
third-party complaint of Long Beach Association
and cross-claim of Los Angeles Bank and research
re whether trial court would retain jurisdiction
over said pleadings if the main action should fall,
attendance at meeting of Federal Home Loan Bank
Stockholders' Committee, obtaining copies of and
studying points and authorities theretofore filed
by all parties to the action and conference with
attorneys for other litigants in connection there-
with, studying transcript of hearing before three-
judge statutory court.

January, 1947.

Preparation of memorandum re issues raised by
points and authorities theretofore filed by all par-
ties to the action.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

April, 1947.

Revision of file and research re right of Los Angeles Bank to file brief in United States Supreme Court, conferences with Mr. FitzPatrick and with attorneys for other litigants, preparation of memorandum re points to be covered in brief of Los Angeles Bank to be filed in United States Supreme Court, preparation of appellate brief of Los Angeles Bank, including [146] research re constitutionality of Section 5(d) of the Home Owners Loan Act and estoppel to challenge the same, exhaustion of administrative remedies, effect of failure to obtain personal jurisdiction over defendant Fahey and other complicated legal questions.

June, 1947.

Studying opinion of United States Supreme Court and conferences with Messrs. Daugherty and Bishop re effect thereof.

July, 1947.

Conference with Mr. FitzPatrick and attorneys for other litigants.

September, 1947.

Conference with Mr. FitzPatrick and attorneys for other litigants, court appearances, research re manner of substituting parties cross-defendant.

October, 1947.

Drafting plan for reestablishment of Los Angeles Bank and conferences with Mr. FitzPatrick

Petitioners' Exhibit No. 2-27-50-2—(Continued)

re same, studying proposed answer of Los Angeles Bank to complaints in intervention, conference with Mr. FitzPatrick and other litigants re proposed interpleader, attendance at meeting of Federal Home Long Bank Stockholders' Committee and conferences with certain members thereof, examination of the plan for restoration of Long Beach Association to its officers and directors, consideration of question of whether Los Angeles Bank should [147] answer complaints in intervention and examination of said complaints, preparing moving papers re substitution of parties cross-defendant and conferences thereon, study of problems raised by motion of the proposed San Francisco Bank to vacate order permitting third-party complaint of Long Beach Association and cross-claim of Los Angeles Bank, preparation of points and authorities in opposition to said motion.

November, 1947.

Preparation for argument re motion to substitute parties cross-defendant and in opposition to motion to vacate order permitting filing of third-party complaint, in court re hearing of these and other motions attacking pleadings of Long Beach Association and other parties on its side of the litigation, study of transcript covering Judge Hall's ruling on said motions, conferences with Mr. FitzPatrick and with Mr. Eason.

December, 1947.

Examination of plaintiff's amended and supplemental complaint and drafting of answer thereto.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

January, 1948.

Conference with members of legal department of Title Insurance and Trust Company, examination of answer of Long Beach Association to amended and supplemental complaint, conference with attorneys for other litigants, with Mr. FitzPatrick and with Mr. Eason, examination of orders returning Long Beach [148] Association to its officers and directors.

February, 1948.

Conference with members of the legal department of Title Insurance and Trust Company, conference with attorneys for other litigants re motion of Long Beach Association to compel statement of claims against it and study of moving papers, attendance at meeting of Federal Home Loan Bank Stockholders' Committee, conferences with Mr. FitzPatrick and with attorneys for other litigants, preparation of return to order to show cause re motion of Long Beach Association to compel setting forth of claims against it.

March, 1948.

Details incident to filing above mentioned return to order to show cause, conferences with Mr. FitzPatrick, in court re hearing of above mentioned order to show cause, study of proposed order requiring deposit in court of collateral held by the purported San Francisco Bank and conferences re correction of same, revision of proposed plan for

Petitioners' Exhibit No. 2-27-50-2—(Continued)
reconstitution of Los Angeles Bank and conferences
re motion and order for the return of excess col-
lateral held by the purported San Francisco Bank
to Long Beach Association, attendance at meeting
of Federal Home Loan Bank Stockholders' Com-
mittee.

May, 1948.

Preparation of moving papers for substitution
of new parties cross-defendant, conference with
certain members of [149] Federal Home Loan Bank
Stockholders' Committee, conference with Mr. Fitz-
Patrick concerning form of ballot for proposed
vote of stockholders in favor of reconstituting Los
Angeles Bank.

June, 1948.

Conferences re above mentioned substitution
papers, study of supplemental cross-claim of Long
Beach Association, attending meeting of Federal
Home Loan Bank Stockholders' Committee, re-
search re potential liability of directors of Los
Angeles Bank should they authorize a compromise
of this litigation, conferences with Mr. FitzPatrick
re said potential liability.

July, 1948.

Research re potential liability of directors of Los
Angeles Bank should they authorize a compromise
of this litigation and conferences with Mr. Fitz-
Patrick thereon, study or draft of order to show
cause and motion of Long Beach Association for

Petitioners' Exhibit No. 2-27-50-2—(Continued)
dissolution of the purported San Francisco Bank and reestablishment of Los Angeles Bank and conferences with attorneys for other litigants thereon, trip to Fresno and court appearance re motion for substitution of parties cross-defendant and other motions, conference re above mentioned order to show cause, study of supplemental cross-claim of Long Beach Association and drafting answer thereto, drafting proposed stipulated judgment for settlement of litigation and [150] conferences with Mr. FitzPatrick thereon, attendance at meeting of Federal Home Loan Bank Stockholders' Committee, examination of petition for restraining order enjoining San Francisco suit of ten Bay Area savings and loan associations, court appearance re restraining San Francisco suit.

August, 1948.

Conference with Messrs. McKenna and FitzPatrick re proposed stipulated judgment, examination of publicity of the above-mentioned ten Bay Area savings and loan associations, conference in San Francisco with Messrs. FitzPatrick, Dusenbery, McKenna and Barnett re proposed stipulated judgment, study of recent pleadings filed in this litigation, drafting memorandum re cost of proposed settlement, study of order to show cause and motion of Long Beach Association for dissolution of the proposed San Francisco Bank and for reestablishment of Los Angeles Bank and preparation of return to said order to show cause, attendance at

Petitioners' Exhibit No. 2-27-50-2—(Continued)
meeting of Federal Home Loan Bank Stockholders' Committee, conference with certain members of said committee, study of order to show cause and motion of Long Beach Association to restrain Sun Valley meeting of stockholders of the purported San Francisco Bank and conference with Mr. FitzPatrick thereon, in court re hearing on said order to show cause and motion.

October, 1948.

Conference with Mr. FitzPatrick re proposed hearing in [151] Washington, D. C., to consider reestablishment of Los Angeles Bank, in court re hearing on motion of Long Beach Association, joined in by Los Angeles Bank, for inspection of documents, and conference with Messrs. Holmes, Burns, et al., re settlement of litigation.

During each of the above-mentioned months there were conferences among various partners and employees of the law firm of O'Melveny & Myers with respect to the matters set forth above. Furthermore, no attempt has been made to itemize the voluminous correspondence and numerous telephone calls regarding such matters which took place over the above-mentioned period.

The legal services necessarily performed by Messrs. O'Melveny & Myers from and after October 31, 1948, to and including the date of filing hereof have not as yet been calculated.

16. The legal services necessarily performed by Messrs. O'Melveny & Myers from and after April 1

Petitioners' Exhibit No. 2-27-50-2—(Continued)
dissolution of the purported San Francisco Bank and reestablishment of Los Angeles Bank and conferences with attorneys for other litigants thereon, trip to Fresno and court appearance re motion for substitution of parties cross-defendant and other motions, conference re above mentioned order to show cause, study of supplemental cross-claim of Long Beach Association and drafting answer thereto, drafting proposed stipulated judgment for settlement of litigation and [150] conferences with Mr. FitzPatrick thereon, attendance at meeting of Federal Home Loan Bank Stockholders' Committee, examination of petition for restraining order enjoining San Francisco suit of ten Bay Area savings and loan associations, court appearance re restraining San Francisco suit.

August, 1948.

Conference with Messrs. McKenna and FitzPatrick re proposed stipulated judgment, examination of publicity of the above-mentioned ten Bay Area savings and loan associations, conference in San Francisco with Messrs. FitzPatrick, Dusenbery, McKenna and Barnett re proposed stipulated judgment, study of recent pleadings filed in this litigation, drafting memorandum re cost of proposed settlement, study of order to show cause and motion of Long Beach Association for dissolution of the proposed San Francisco Bank and for reestablishment of Los Angeles Bank and preparation of return to said order to show cause, attendance at

Petitioners' Exhibit No. 2-27-50-2—(Continued)
meeting of Federal Home Loan Bank Stockholders' Committee, conference with certain members of said committee, study of order to show cause and motion of Long Beach Association to restrain Sun Valley meeting of stockholders of the purported San Francisco Bank and conference with Mr. FitzPatrick thereon, in court re hearing on said order to show cause and motion.

October, 1948.

Conference with Mr. FitzPatrick re proposed hearing in [151] Washington, D. C., to consider reestablishment of Los Angeles Bank, in court re hearing on motion of Long Beach Association, joined in by Los Angeles Bank, for inspection of documents, and conference with Messrs. Holmes, Burns, et al., re settlement of litigation.

During each of the above-mentioned months there were conferences among various partners and employees of the law firm of O'Melveny & Myers with respect to the matters set forth above. Furthermore, no attempt has been made to itemize the voluminous correspondence and numerous telephone calls regarding such matters which took place over the above-mentioned period.

The legal services necessarily performed by Messrs. O'Melveny & Myers from and after October 31, 1948, to and including the date of filing hereof have not as yet been calculated.

16. The legal services necessarily performed by Messrs. O'Melveny & Myers from and after April 1

Petitioners' Exhibit No. 2-27-50-2—(Continued) and 2, 1946, to and including October 31, 1948, in both of the above-mentioned consolidated civil actions have required a combined total of 1634 hours of attorneys' time and 405 hours of stenographers' time, said attorneys' time being made up as follows:

	Court Time	Office Time	Totals
Partners	101½	309	319½
Employees	70½	1244	1314½
Totals.....	81	1553	1634

17. In addition, it is contemplated that Messrs. O'Melveny & Myers and Richard FitzPatrick, Esq., will necessarily be required to perform additional legal services in connection with the future conduct of Civil Action No. 5421-PH on behalf of defendant, third-party defendant, cross-claimant, and cross-defendant Los Angeles Bank. Said contemplated future services will consist in general of resisting the multi-million dollar damage claims set forth in the supplemental cross-claim to amended cross-claim of defendant and third-party plaintiff Long Beach Association, filed in said action on May 28, 1948, as against Los Angeles Bank and numerous other cross-defendants. Said resistance will require not only preparation for trial but the trial itself may last for several months, following which it may be necessary to take or resist an appeal from the judgment of the above-entitled Court entered upon said supplemental cross-claim.

18. Affiants, and each of them, respectfully state that each and all of the claims and defenses asserted

Petitioners' Exhibit No. 2-27-50-2—(Continued)
by Los Angeles Bank as a party to the above-entitled consolidated actions are meritorious and are made in good faith. In this connection affiants, and each of them, state that at the forthcoming trial of said consolidated actions they expect to prove, among other things, each and all of the facts heretofore presented to the hereinabove-mentioned Select Committee to Investigate Executive Agencies of the House of [153] Representatives, Seventy-ninth Congress, Second Session, as to which said Committee recommended, among other things, as follows:

“(1) That the Commissioner revoke the order reducing the number of districts from 12 to 11 in the Federal Home Loan Bank System.

“(2) That the Commissioner take all necessary steps to re-establish a Federal Home Loan Bank of Los Angeles and a Federal Home Loan Bank of Portland, and revoke the order or orders by which the assets of these two district banks were intermingled.

“* * *

“(5) That the appropriate committees of Congress give consideration to the necessity (if, in the opinion of such committees, the necessity exists) of amending the Federal Home Loan Act in the following particulars:

“(a) Clarifying the authority of the Board in the matter of approval of elective officers of the regional banks to the end that neither the Board

Petitioners' Exhibit No. 2-27-50-2—(Continued)
nor other officials may exercise such authority arbitrarily.

“(b) Clarifying the authority of the Board or the Administrator to increase or decrease the number of regional banks, and specifying the [154] condition and procedure under which such changes may be made.”

In this connection affiants further state that Long Beach Association has already been returned to the management of its own officers and directors, and that defendant John H. Fahey has heretofore been removed as purported Federal Home Loan Bank Commissioner.

19. No attorneys' fees have been heretofore paid or allowed to Messrs. O'Melveny & Myers and Richard FitzPatrick, Esq., or either of them, on account of their legal services rendered in Civil Action No. 5678-PH (WM) and Civil Action No. 5421-PH, except as follows: On or about July 31, 1946, the Federal Home Loan Bank Stockholders' Committee paid the sum of \$2,500.00 on account to Richard FitzPatrick, Esq.; on or about October 15, 1946, said committee paid the sum of \$2,500.00 on account to Messrs. O'Melveny & Myers; on or about February 18, 1948, said committee paid the sum of \$2,500.00 on account to Richard FitzPatrick, Esq.; and on or about February 17, 1948, said committee paid the sum of \$2,500.00 on account to Messrs. O'Melveny & Myers.

Wherefore, your affiants, and each of them, pray

Petitioners' Exhibit No. 2-27-50-2—(Continued)
that the above-entitled Court make and enter the
order specified on pages 2 to 3 of the notice of
motion to which this affidavit is attached.

/s/ PIERCE WORKS, [155]

/s/ JOHN WHYTE.

Subscribed and sworn to before me this 5th day
of January, 1949.

/s/ AGNES E. SHULTZ,
Notary Public in and for Said County and
State. [156]

Exhibit A

Schedule of Hours by Individual Attorneys Spent in
Connection With Civil Action No. 5678-PH (WM)

Partners	Court	Office	Total
Paul Fussell		70	70
Pierce Works		761½	761½
Jackson W. Chance	2½	4½	7
Sidney H. Wall		71½	71½
W. B. Carman		11½	11½
Employees			
John Whyte	3	473	476
Roy B. Woolsey		331½	331½
Howard J. Deards		39	39
Leo Deegan		4	4
Borgny Baird		35	35
James Dunlap		22	22
Frank T. Hamilton		5	5
Robert Cahall		1	1
*Frank Forve		40	40
Clinton Clad		10	10
Totals.....	5½	822½	828

* Law school graduate—not then admitted to practice—research
work only.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

Exhibit B

Schedule of Hours by Individual Attorneys Spent in
Connection With Civil Action No. 5421-PH

Partners	Court	Office	Total
Paul Fussell	3	104½	107½
Jackson W. Chance		13	13
Pierce Works	5	29	34
Homer I. Mitchell		2½	2½
Employees			
John Whyte	67½	375½	443
Howard J. Deards		92½	92½
Roy B. Woolsey		17½	17½
*Edward Rauscher		96	96
Totals.....	75½	730½	806

Affidavit of Richard FitzPatrick in Support of
Application for Attorneys' Fees

State of California,

County of Los Angeles—ss.

Richard FitzPatrick, being first duly sworn says:

He is now and at all times herein mentioned, has been an attorney-at-law, duly admitted and licensed to practice since December, 1917, in all the courts of the State of California, in the United States Circuit Court of Appeals for the Ninth Circuit, in the District Court of the United States in and for the Southern District of California, Central Division, and since December, 1943, in the Supreme Court of the United States.

On or about the 1st day of April, 1946, he was employed by the Federal Home Loan Bank of Los

* Law school graduate—not then admitted to practice—research work only.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

Angeles, the plaintiff and cross-defendant above named, to consider Orders Nos. 5082, 5083 and 5084 of the Federal Home Loan Bank Administration dated March 29, 1946, and the actions taken pursuant thereto by the Federal Home Loan Bank Administration, its officers, attorneys, agents and employees; to consider the rights of the Federal Home Loan Bank of Los Angeles, the board of directors of said bank and the members thereof, with respect to said orders and actions; to consider the rights of the stockholders [159] of said bank with respect to said orders and actions; to advise what actions, suits or proceedings said parties, or any of them, might, could or should take to protect their respective rights, and to bring such actions, suits or proceedings in the state or Federal courts in the state of California, or elsewhere as might be determined to be proper, and otherwise to assist said parties in the protection of their rights and interest.

Affiant accepted said employment, and has ever since on or about the 1st day of April, 1946, been engaged in the discharge of duties and obligations, assumed by him in accepting such employment, as hereinafter shown.

On March 29, 1946, at about 1:00 o'clock p.m., C. E. Berry, Vice President of the Federal Home Loan Bank of Los Angeles, telephoned affiant that certain persons representing the Federal Home Loan Bank Administration had appeared at the office of the bank at about 12:00 o'clock noon of

Petitioners' Exhibit No. 2-27-50-2—(Continued)
that day, and had presented to him certified copies of Federal Home Loan Bank Administration Orders Nos. 5082, 5083 and 5084 and had demanded that he deliver to them possession of the offices of the bank and its assets. He read to affiant on the telephone said Orders Nos. 5082, 5083 and 5084, and requested that affiant telephone T. A. Gregory, Eugene Webb, Jr., F. B. Palmer, and C. A. Carden, directors of the bank who resided in Los Angeles County, and ask them to attend a conference [160] to be held in affiant's office at 3:00 p.m. of that day to consider said orders and the seizure of said bank.

Affiant telephoned said directors as requested, and at about 3:00 p.m. said directors together with C. E. Berry met at affiant's office, and there conferred with him concerning the seizure of the Federal Home Loan Bank of Los Angeles. It was then and there decided that a conference should be sought with Paul Fussell, Esq., of the law firm of O'Melveny & Myers, to confer with him concerning such seizure. All of the persons named, including affiant, then went to the office of Mr. Fussell, and conferred with him and his partner, Pierce Works, Esq., concerning the seizure of the Federal Home Loan Bank of Los Angeles.

Said directors of the Federal Home Loan Bank of Los Angeles and C. E. Berry, its vice president, then and there, on behalf of said Federal Home Loan Bank of Los Angeles, employed affiant, the firm of O'Melveny & Myers, and Paul Fussell, Esq., of that firm, to advise them as to what action,

Petitioners' Exhibit No. 2-27-50-2—(Continued)
if any, said directors and C. E. Berry should take to protect the rights and interests of said bank, its directors and its stockholder members.

At said conference a statement of the matters preceding and leading to the issuance of said orders and the seizure of said bank was made to Mr. Fussell, Mr. Works and affiant, by said directors and C. E. Berry, and copies of said orders [161] were presented to them. Said statements, said orders and the provisions of the Federal Home Loan Bank Act governing the creation and operation of the twelve banks constituting the Federal Home Loan Bank System were considered by Mr. Fussell, Mr. Works and affiant, and they expressed the opinion that said orders and the seizure of said bank were unlawful and void, and that in their judgment such seizure should be resisted.

They also advised that a special meeting of the executive committee of said bank should be held as soon as possible to consider the orders of the Federal Home Loan Bank Administration and the seizure of the bank and to take such action with reference thereto, as said committeemen should deem appropriate.

At said conference Messrs. Fussell and Works and affiant advised that a special meeting of the board of directors of the Federal Home Loan Bank of Los Angeles should also be held for the purpose of considering and acting upon the purported orders of the Federal Home Loan Bank Administration.

After examination of a copy of the by-laws of

Petitioners' Exhibit No. 2-27-50-2—(Continued)
said bank by Messrs. Fussell, Works and affiant, and in accordance therewith, a call and notice of such a meeting to be held on April 2, 1946, was prepared by Paul Fussell, Esq., and affiant, and was signed by the four directors of said bank above named, and was sent on March 29, 1946, by prepaid telegram, to each [162] member of the board of directors who had not signed said call and notice, and a copy thereof was personally delivered, on March 29, 1946, to each of said directors who had signed the same.

On March 30, 1946, affiant prepared a form of consent to hold and waiver of notice of a special meeting of the executive committee of the Federal Home Loan Board of Los Angeles to be held on April 1, 1946. Signatures thereto of all of the members of that committee were obtained.

Affiant was engaged the entire days of March 30 and 31, 1946, with innumerable telephone calls and conferences, all pertaining to said seizure of the Federal Home Loan Bank of Los Angeles.

At said meeting said committee adopted resolutions ratifying, approving and confirming the action of said directors, Carden, Gregory, Webb and Palmer, in consulting and employing affiant and the firm of O'Melveny & Myers, and Paul Fussell, Esq., of said firm, on behalf of the Federal Home Loan Bank of Los Angeles, (1) to consider said orders and the actions taken pursuant thereto by the Federal Home Loan Bank Administration, its officers, attorneys, agents and employees; (2) to consider

Petitioners' Exhibit No. 2-27-50-2—(Continued)
the rights of the Federal Home Loan Bank of Los Angeles, the board of directors of said bank and the members thereof, with respect to said orders and actions; (3) to consider the rights of the stockholders of said bank with respect [163] to said orders and actions; (4) to advise what actions, suits or proceedings said parties or any of them, may, can or should take to protect their respective rights, and (5) to bring such actions, suits and proceedings in the state or Federal courts in the state of California or elsewhere, as said lawyers determine to be proper, and otherwise to assist said parties in the protection of their rights and interests.

Further resolutions were adopted at said meeting of said executive committee that the seizure of said bank by the Federal Home Loan Bank Administration be called to the attention of the trade organizations of the savings and loan industry and of the members of the Federal Home Loan Bank System throughout the United States, and to the attention of the Senators and Members of Congress of the United States with the request that a congressional investigation be made of the acts of the Federal Home Loan Bank Administration, and of the Federal Home Loan Bank Commissioner in issuing said orders and in seizing the Federal Home Loan Bank of Los Angeles.

Affiant was engaged the entire day of April 1, 1946, in attending said meeting of the executive committee of the Federal Home Loan Bank of Los Angeles, in many conferences with the members of that

Petitioners' Exhibit No. 2-27-50-2—(Continued)
committee, with C. E. Berry, vice president of said Federal Home Loan Bank of Los Angeles and with Paul Fussell, Esq., and in many telephone conferences, all pertaining to the seizure of said bank. Affiant also prepared [164] minutes of said executive meeting held on April 1, 1946.

Affiant was likewise engaged the entire day of April 2, 1946, in attending the special meeting of the board of directors of the Federal Home Loan Bank of Los Angeles held on that day, in conferences with the directors of said bank, with the directors of the California Savings and Loan League, and with Paul Fussell, Esq., and in attending the meeting of stockholders of the Federal Home Loan Bank of Los Angeles hereinafter mentioned.

At said special meeting of the board of directors of the Federal Home Loan Bank of Los Angeles resolutions were adopted ratifying, confirming and approving all actions of the executive committee taken at the special meeting thereof held on April 1, 1946.

Affiant, with Paul Fussell, Esq., attended a meeting of stockholders of the Federal Home Loan Bank of Los Angeles held in Los Angeles, California, on April 2, 1946. At said meeting of stockholders, a committee of the stockholders of said bank was appointed to consider and act upon all matters growing out of the seizure of said bank. The committee met immediately following the adjournment of the meeting of stockholders and or-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
ganized by the election of officers, and then adjourned to convene the following day.

Affiant attended the adjourned meeting of the committee [165] of stockholders of the Federal Home Loan Bank of Los Angeles. At said meeting a resolution was adopted that the committee retain affiant and the law firm of O'Melveny & Myers and Paul Fussell, Esq., of that firm, and said committee requested that said attorneys render opinions as to the legality of federal and state chartered savings and loan associations, which are stockholders of the Federal Home Loan Bank of Los Angeles, contributing funds to the committee to defray its expenses, and as to how stockholders of the Federal Home Loan Bank of Los Angeles might reserve their rights to object to the validity of the actions of the Federal Home Loan Bank Commissioner in seizing said bank, if such stockholders had business dealings with the Federal Home Loan Bank of San Francisco.

In April, 1946, affiant prepared minutes of the special meeting of the board of directors of the Federal Home Loan Bank of Los Angeles held on April 2, 1946, and had many telephone conferences with C. E. Berry, Paul Fussell, Esq., and with officers of stockholder members of the Federal Home Loan Bank of Los Angeles.

In the early part of April, 1946, affiant was engaged in day-long conferences with C. E. Berry and T. A. Gregory, the latter being one of the members of the Stockholders' Committee, and in innumer-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
able telephone conversations with members of that committee, all relating to the seizure of said Federal Home Loan Bank of Los Angeles. Affiant also conferred [166] continually with his associate, Paul Fussell, Esq., and with C. E. Berry, and members of the Stockholders' Committee. Among the matters considered in such conference was whether the Stockholders' Committee must obtain a license from the California Corporation Commissioner to act as a security owners' protective committee as provided in statutes of the State of California. It was determined that the Stockholders' Committee should seek a license as required by said act. Affiant assisted Paul Fussell, Esq., in the preparation of said application which was thereafter filed with the Corporation Commissioner. Said application was thereafter granted and said committee duly licensed.

Thereafter between the dates of April 11, 1946, to April 22, 1946, nearly all of affiant's time was engaged in matters relating to the seizure of said bank; in conferences with members of the Stockholders' Committee, with C. E. Berry, Paul Fussell, Esq., and many others. Among many other things, he was engaged in assisting Mr. Fussell in the preparation of an opinion as to the legality of stockholders of the Federal Home Loan Bank of Los Angeles contributing funds to the Stockholders' Committee to defray its expenses, and in the preparation of a form of protest of the seizure of said bank and a reservation of rights if stockholders of the Federal Home Loan Bank of Los Angeles had

Petitioners' Exhibit No. 2-27-50-2—(Continued)
business dealings with the Federal Home Loan Bank of San Francisco to be signed by [167] stockholders of the Federal Home Loan Bank of Los Angeles.

Affiant was also engaged in the preparation of a lengthy report by the Stockholders' Committee of the seizure of said bank and of the actions taken and proposed to be taken by said committee with reference thereto to be sent to the stockholders of said bank and other interested persons.

In the latter part of April, 1946, affiant spent almost the entire day in attendance upon a meeting of the Stockholders' Committee. At said meeting there was presented to the committee the opinion prepared by Mr. Fussell and affiant holding that both Federal and State savings and loan associations might lawfully pay contributions to said Stockholders' Committee for the purpose of providing funds to defray the cost of the committee's activities. The committee distributed copies of said opinion to all stockholders of the Federal Home Loan Bank of Los Angeles.

There was also presented to the committee a letter of advice, prepared by Mr. Fussell and affiant, with regard to stockholders of said bank protesting said Orders Numbers 5082, 5083 and 5084, and reserving their rights, notwithstanding any transactions they might have with the Federal Home Loan Bank of San Francisco, and enclosing a suggested form of such protest and reservation of rights. Said letter

Petitioners' Exhibit No. 2-27-50-2—(Continued)
and form were sent to all stockholders of the Federal Home Loan Bank of Los Angeles. [168]

The committee also considered the report, prepared by affiant, of the seizure of the bank and of the actions taken and proposed to be taken by the Stockholders' Committee. This report was sent to all stockholders of said bank, to all savings and loan associations throughout the United States, to all Federal Home Loan Banks, to the Federal Home Loan Bank Commissioner, to all State savings and loan leagues, to the President of the United States, to all Senators and Congressmen and to all National Housing Authority officials.

The committee also directed that affiant and certain members of the committee attend a meeting of the Bay Cities Savings and Loan League, to be held in San Francisco, for the purpose of hearing from representatives of the committee and of the Federal Home Loan Bank Administration as to the seizure of the Federal Home Loan Bank of Los Angeles.

During the last part of April, 1946, affiant devoted at least one-half of his time to conferences, telephone calls and other matters pertaining to the seizure of the Federal Home Loan Bank of Los Angeles. Affiant went by plane to San Francisco to attend a conference of members of the Stockholders' Committee held in that city, and to attend the meeting of the Bay Cities Savings and Loan League held in that city at which the seizure of the Federal Home Loan Bank of Los Angeles was con-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
sidered, returning by plane to Los Angeles. [169]

From March 29, 1946, to April 30, 1946, both dates inclusive, affiant spent a total of 141 hours on the above-indicated work.

During the month of May, 1946, affiant had innumerable conferences with association counsel, with C. E. Berry, with members of the Stockholders' Committee and others; in attendance at meetings of the Stockholders' Committee; in assisting associate counsel in the drafting of a complaint to be filed in an action to be brought by the Federal Home Loan Bank of Los Angeles seeking to recover its assets; and in traveling to Washington, D. C., to prepare for a Congressional investigation of the seizure of the Federal Home Loan Bank of Los Angeles, scheduled to be made by the House of Representatives' Select Committee to Investigate Executive Agencies commencing June 12, 1946.

Affiant, with Paul Fussell, Esq., attended a meeting of said Stockholders' Committee, in May, 1946, at which meeting they reported on the research of questions of law involved in the proposed suit and on the drafting of a complaint to be filed against the Federal Home Loan Bank of San Francisco, et al.

Affiant attended, with John Whyte, Esq., of the firm of O'Melveny & Myers, meetings of the Stockholders' Committee, and of officers of certain stockholders of the bank, held in Fresno, California, on May 19 and May 20. [170]

On May 20, 1946, the Federal Home Loan Bank

Petitioners' Exhibit No. 2-27-50-2—(Continued)
Commissioner seized the Long Beach Federal Savings and Loan Association.

Affiant attended a meeting of said Stockholders' Committee held in Los Angeles in the latter part of May, at which meeting reports were made of the seizure of the Long Beach Federal Savings and Loan Association on May 20, 1946, and of the Congressional investigation, scheduled to be held in Washington, D. C., of the seizure of the Federal Home Loan Bank of Los Angeles, which investigation was to be expanded to cover the seizure of the Long Beach Association.

Affiant was instructed at said meeting to go to Washington, D. C., with J. Howard Edgerton, one of the members of the Stockholders' Committee, and there to employ counsel to assist affiant in preparing to present, and in presenting, the facts concerning the seizures of the Federal Home Loan Bank of Los Angeles and of the Long Beach Association to the Congressional Committee investigating them.

Affiant went by plane to Washington, D. C., where, with J. Howard Edgerton, affiant employed, on behalf of the Stockholders' Committee of Federal Home Loan Bank of Los Angeles, the law firm of Douglas, Obear and Campbell to assist affiant in preparing to present and in presenting all of the facts concerning the seizure of the Federal Home Loan Bank of Los Angeles to said Congressional Committee.

The total time spent by affiant during the month

Petitioners' Exhibit No. 2-27-50-2—(Continued) of May, [171] 1946, in the work above outlined, amounted to 153.3 hours. Of this time, over six days were spent away from Los Angeles where affiant's office is located.

During the first half of June, 1946, affiant was in Washington, D. C., or New York City, preparing for said Congressional investigation, including the preparation of statements of witnesses to be produced by the Federal Home Loan Bank of Los Angeles as to the seizure of said bank, and in attending upon the hearing held by said Congressional Committee.

Reference is made to the record of said hearing and the report of the Congressional Committee issued as a result of such investigation, copies of which have heretofore been filed with the above-entitled court in the above-entitled action Number 5421 PH.

Affiant returned from Washington, D. C., to his office in Los Angeles, California, about the middle of June, 1946, and during the balance of the month was continuously engaged in innumerable conferences with associate counsel; in study of the record of the Congressional investigation; in attending a meeting of the Stockholders' Committee, and reporting thereat on the Congressional investigation; in attending two meetings of officers of stockholders of the Federal Home Loan Bank of Los Angeles, held in Los Angeles, and reporting thereat on said Congressional investigation, and in innumerable tele-

phone conferences with C. E. Berry, members of the [173] Stockholders Committee, officers of stockholders of the Federal Home Loan Bank of Los Angeles and many others.

The total time spent by affiant during the month of June, 1946, in the work outlined above amounted to over 183 hours. Of this time, 16 days were spent away from Los Angeles, where affiant's office is located.

During the month of July, 1946, affiant was engaged in the study of, and in many conferences with Messrs. Works and Whyte of O'Melveny & Myers concerning the cross complaint filed by the Long Beach Federal Savings and Loan Association against the Federal Home Loan Bank Commissioner, the Federal Home Loan Bank of Los Angeles and many others, seeking a determination of the legality of the seizure of said Federal Home Loan Bank of Los Angeles. He was also engaged in consideration of the question whether stockholders of the Federal Home Loan Bank of Los Angeles should join in the suit to be concerned by that bank, and whether such suit should be commenced, or answer to the Long Beach Federal Savings and Loan Association's cross-complaint should be filed, prior to the issuance of a report by the Congressional Committee of its investigation of the seizure of said bank and said association.

During the month of July and the early part of the month of August, 1946, affiant and the law firm of O'Melveny & Myers, were employed and retained
Petitioners' Exhibit No. 2-27-50-2—(Continued)

by the association plaintiffs [173] in the above-mentioned action numbered 5678 WM. Said lawyers were retained and employed, (1) to consider said Orders Numbers 5082, 5083 and 5084 and any other orders of said Federal Home Loan Bank Administration which they deemed pertinent, and any actions taken pursuant thereto by the Federal Home Loan Bank Administration, its officers, agents, attorneys or employees, (2) to consider the rights of said associations as stockholders of the Federal Home Loan Bank of Los Angeles with respect to said orders and actions, (3) to advise what actions, suits, proceedings, or other steps said association might, could or should take to protect their rights, (4) in behalf of said associations to institute, defend, intervene or otherwise appear, or participate in such actions, suits or proceedings in the State or Federal courts, either in the State of California, or elsewhere, as said attorneys determined to be appropriate, and (5) generally, to take such action, whether like or unlike the foregoing, as said attorneys might deem appropriate to protect the rights and interests of said association.

During said month of July, 1946, affiant obtained needed information from said association stockholders of the Federal Home Loan Bank of Los Angeles, if such stockholders were to become plaintiffs in said suit proposed to be brought by the Federal Home Loan Bank of Los Angeles.

He studied a lengthy memorandum of authorities prepared [174] by Mr. Whyte as to the jurisdiction of the above-entitled court of the proposed suit to

Petitioners' Exhibit No. 2-27-50-2—(Continued)
be brought by the Federal Home Loan Bank of Los Angeles.

Because of the importance of the question as to the above-entitled court's jurisdiction of the suit proposed to be brought by the Federal Home Loan Bank of Los Angeles, and because the question of jurisdiction was involved in the above-entitled action numbered 5421 PH, brought by the Long Beach Federal Savings and Loan Association, he attended the hearing, on July 16, 1946, in the above-entitled court, of arguments as to the jurisdiction of said court of said action brought by the Long Beach association, and as to the constitutionality of Section 5(d) of the Home Owners' Loan Act of 1933.

He studied the Congressional Committee's report, issued July 25, 1946, of its investigation of the seizures of the Federal Home Loan Bank of Los Angeles and of the Long Beach association.

He attended a meeting of the Stockholders' Committee at which said report was considered. He had innumerable telephone conferences with associate counsel, members of the Stockholders' Committee, with officers of stockholders of the Federal Home Loan Bank of Los Angeles, and received and wrote many letters, all concerning the matters set forth herein.

The total time expended by affiant during the month of [175] July, 1946, on the matters above outlined, was 64.2 hours.

During the month of August, 1946, affiant assisted Messrs. Fussell, Works and Whyte of O'Mel-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
veny & Myers in the final preparation of the complaint in the above-entitled action numbered 5678 WM, filed herein August 22, 1946. He also assisted said attorneys in the final preparation of the answer of the Federal Home Loan Bank of Los Angeles to the cross-claim filed by the Long Beach association in said action numbered 5421 PH, wherein said Long Beach association sought a determination of the validity of the seizure of the Federal Home Loan Bank of Los Angeles.

He prepared a bulletin from the Stockholders' Committee advising the stockholders of the Federal Home Loan Bank of Los Angeles, and other interested parties, of the filing of said suit to recover the assets of the Federal Home Loan Bank of Los Angeles. He had much correspondence and innumerable telephone calls, all concerning the matters herein mentioned.

The total time spent by affiant during the month of August, 1946, in the matters above-outlined, was 36.5 hours.

During the month of September, 1946, affiant studied the opinion of the above-entitled court in the suit brought by the Long Beach association, numbered 5421 PH, holding that said court had jurisdiction of said action, and that Section 5(d) of the Home Owners' Loan Act of 1933 was unconstitutional, and considered the effect of said decision upon the action [176] brought by the Federal Home Loan Bank of Los Angeles, et al. He had many telephone conferences concerning said decision and the opinion of the court, with his associate

Petitioners' Exhibit No. 2-27-50-2—(Continued)
counsel, with members of the Stockholders' Committee and with officers of stockholders of the Federal Home Loan Bank of Los Angeles. He prepared a bulletin from the Stockholders' Committee sending a copy of the court's opinion to stockholders of the Federal Home Loan Bank of Los Angeles and to other interested parties. He conferred with counsel for other litigants, and with affiant's associate counsel, as to approval by affiant and his associate counsel of the form of judgment entered in the Long Beach association case.

He conferred with Messrs. Works and Fussell as to whether the Federal Home Loan Bank of Los Angeles should seek an injunction against the Federal Home Loan Bank Commissioner and others, and should seek to have a three Judge Court appointed to consider the constitutionality of certain sections of the Federal Home Loan Bank Act, under which said Federal Home Loan Bank Commissioner purported to act in seizing the Federal Home Loan Bank of Los Angeles. He spent much time in research of said questions.

He also conferred at length with members of the Stockholders' Committee concerning the litigation and the effect of the decisions in the Long Beach Association case and the Federal Home Loan Bank of Los Angeles case. [177]

He studied the defendants' objections to the proposed findings and decree in the Long Beach association case, and conferred by telephone with Mr. Works with regard thereto.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

He studied the request of the defendants in the Long Beach case for a stay of execution.

He conferred at length with members of the Stockholders' Committee, and had a telephone conference with Mr. Works concerning possible consolidation of the above-entitled actions.

He studied the decree in the Long Beach association case filed on September 30, and had many telephone conferences with members of the Stockholders' Committee concerning said decree. In addition, throughout the month, he had many other telephone conferences with various parties interested in the litigation and much correspondence.

The total time spent by affiant during the month of September, 1946, in the matters above-outlined, was 32.9 hours.

During the month of October, 1946, affiant prepared a bulletin sent out by the Stockholders' Committee to the stockholders of the Los Angeles bank and others transmitting a copy of the judgment of the three judge court in the Long Beach association case.

Affiant received a copy of the order of Justice Rutledge of the Supreme Court of the United States staying execution [178] of said judgment in the Long Beach association case. He had many telephone conferences with members of the Stockholders' Committee and others concerning said order. He prepared a bulletin of the Stockholders' Committee transmitting to the stockholders of the Los Angeles bank and others a copy of the order staying

Petitioners' Exhibit No. 2-27-50-2—(Continued)
the execution of said judgment. He conferred on the telephone with his associate counsel with regard to said stay of execution.

He received and studied the papers served upon him by the defendants in the Long Beach association case appealing from said judgment.

He attended two meetings of the Stockholders' Committee.

He received and studied a lengthy memorandum of authorities prepared by Mr. Whyte relating to the unconstitutionality of certain sections of the Federal Home Loan Bank Act involved in the Federal Home Loan Bank of Los Angeles case, and did extensive research of his own on said question. He conferred with Messrs. Works and Whyte on said question.

He received and studied the motion to dismiss the Bank case, and the points and authorities in support thereof, filed by defendant Fahey.

In addition to the above-mentioned matters, affiant had innumerable telephone calls from and to his associate counsel, members of the Stockholders' Committee and many others, and had much correspondence, all relating to the matters herein [179] mentioned.

The total time spent by affiant during the month of October, 1946, in the matters above outlined, was 59.3 hours.

During the month of November, 1946, affiant had conferences with Messrs. Works, Whyte and Fussell and with members of the Stockholders' Committee.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

He had a telephone conference with Mr. Works with regard to the Federal Home Loan Bank of Los Angeles joining in the motion of the plaintiffs in the Long Beach Association case, to be made before the Supreme Court of the United States, to vacate the order of Justice Rutledge staying execution of the judgment entered in that case. Affiant and Mr. Works went to the office of Mr. Westover, and examined said motion and signed the same on behalf of the Federal Home Loan Bank of Los Angeles.

Affiant and Mr. Fussell conferred with members of the Stockholders' Committee with regard to the anticipated expenses of carrying on the litigation. In addition, affiant had many telephone calls to and from members of the Stockholders' Committee, and received and wrote a number of letters, all relating to the matters herein mentioned.

The total time spent by affiant during the month of November, 1946, in the matters above outlined, was 14.4 hours.

During the month of December, 1946, affiant conferred with counsel for other litigants and affiant's associate [180] counsel concerning the designation of additional pleadings to be incorporated in the record on appeal in the Long Beach association case, and signed such designation.

He had a telephone conference with counsel for other litigents as to affiant and his associate counsel signing a memorandum of points and authorities in rebuttal to points and authorities filed by the defendants on the motion to vacate the stay order

Petitioners' Exhibit No. 2-27-50-2—(Continued)
in the Long Beach association case. He examined said memorandum, and signed the same.

He had conferences with Mr. Works and counsel for other litigants concerning the setting for hearing of motions to dismiss, etc. filed by the defendants in the Bank case. He attended a conference among Mr. Whyte, counsel for other litigants and members of the Stockholders' Committee, at which the status of both the Federal Home Loan Bank of Los Angeles case and the Long Beach association case, and the time of hearing of motions to dismiss the Bank case, were considered.

He received and studied affidavits of the Federal Home Loan Bank Administration in opposition to the Long Beach association's motion to vacate the order staying execution of the judgment obtained in that case, and rebuttal affidavits filed by the association, and the memorandum of points and authorities filed in support of the motion to vacate the stay order. [181]

He received and studied a supplemental memorandum filed by the appellants in the Long Beach case.

He attended a meeting of certain officers of stockholders of the Los Angeles bank, and reported on the status of the pending litigation.

He conferred with Messrs. Fussell, Works and Whyte concerning the relationship of the Long Beach association case to the Bank case.

He attended, with Messrs. Fussell and Whyte, a meeting of the Stockholders' Committee. At that meeting the advisability of the attorneys for the

Petitioners' Exhibit No. 2-27-50-2—(Continued)

Bank preparing and filing, in the Supreme Court of the United States, a brief in support of the judgment of the three judge court in the Long Beach association case was considered. It was the opinion of those present that the jurisdictional question involved in the Long Beach association case was important to the Bank case, and counsel for the Federal Home Loan Bank of Los Angeles were instructed to prepare and file in the United States Supreme Court a brief in support of the Long Beach association judgment.

Affiant also had many conferences with, and telephone calls to and from, the members of the Stockholders' Committee, and others, concerning the litigation, and he also had much correspondence with reference thereto.

The total time spent by affiant during the month of [182] December, 1946, in the matters above outlined, was 28.3 hours.

During the month of January, 1947, affiant had many conferences with members of the Stockholders' Committee as to the pending litigation, and had much correspondence concerning it. He studied recent decisions of the United States Supreme Court applicable to the pending litigation. He conferred with his associate counsel on points of law to be raised, and authorities to be cited in the brief to be filed in support of the judgment in the Long Beach case. In addition, he had many telephone calls, to and from, members of the Stockholders'

Petitioners' Exhibit No. 2-27-50-2—(Continued)
Committee and others and much correspondence, all relating to the matters herein mentioned.

The total time spent by affiant during the month of January, 1947, in the matters above outlined, was 12.3 hours.

During the month of February, 1947, affiant conferred with members of the Stockholders' Committee. He prepared a bulletin from the Stockholders' Committee with regard to certain legislation pending in the Congress amending the Federal Home Loan Bank Act, and restoring the Federal Home Loan Bank of Los Angeles. He received and considered objections of the United States Acting Solicitor to the record on appeal in the Long Beach association case. He attended a meeting of the Stockholders' Committee held at San Francisco. He had many telephone calls to and from [183] members of the Stockholders' Committee, and received and wrote many letters, all relating to the matters herein stated.

The total time spent by affiant during the month of February, 1947, in the matter above outlined, was 14.5 hours.

During the month of March, 1947, affiant received and studied motions for allowances of attorneys' fees and expenses, and supporting papers, filed by the plaintiffs and others in the Long Beach case.

He conferred with members of the Stockholders' Committee concerning the legislation pending in the Congress to amend the Federal Home Loan Bank Act, and to restore the Federal Home Loan Bank

Petitioners' Exhibit No. 2-27-50-2—(Continued)
of Los Angeles. He had much correspondence with reference to said bills with members of the Stockholders' Committee, and with officers of stockholders of the Los Angeles Bank. He conferred at length with members of the Stockholders' Committee concerning the proposed hearings upon said bills, and the attendance of members of the Stockholders' Committee and other representatives of stockholders of the Los Angeles Bank at such hearings.

He conferred with members of the Stockholders' Committee concerning a proposed meeting of stockholders of the Federal Home Loan Bank of San Francisco.

He attended a meeting of the Stockholders' Committee. In addition, affiant had many telephone calls and much [184] correspondence concerning such matters.

The total time spent by affiant during the month of March, 1947, in the matters above outlined, was 21.9 hours.

During the month of April, 1947, affiant conferred with Messrs. Works and Whyte and counsel for other litigants with regard to the brief to be filed in the Supreme Court of the United States by the Federal Home Loan Bank of Los Angeles, in support of the judgment in the Long Beach association case. He collaborated with Messrs. Works and Whyte in the preparation of said brief.

He prepared a lengthy memorandum with regard to the capital structures of the Federal Home Loan Banks of Los Angeles, Portland and San Francisco,

Petitioners' Exhibit No. 2-27-50-2—(Continued)
at the time of the seizure of the Federal Home Loan Bank of Los Angeles, and as to the provisions of the Federal Home Loan Bank Act with reference to the issuance of consolidated Federal Home Loan Bank debentures, and the retirement of capital of Federal Home Loan Banks.

He prepared a synopsis and index of the testimony presented at the hearing before the Congressional Committee investigating the seizure of the Federal Home Loan Bank of Los Angeles and the Long Beach association.

He received and studied the petition of appellants in the Long Beach case to the Supreme Court of the United States for a writ of mandamus and/or prohibition with regard [185] to the order of the United States District Court allowing attorneys' fees and expenses in the Long Beach case. He studied the briefs filed by the plaintiffs, the Long Beach association, Robert Wallis and Title Service Company, filed in the United States Supreme Court. He studied appellants' brief filed in the United States Supreme Court.

He prepared a resolution to be offered by representatives of the Stockholders' Committee at a proposed meeting of stockholders of the Federal Home Loan Bank of Los Angeles.

He had many telephone conferences with his associate counsel and with counsel in the Long Beach case. He also had many telephone calls to and from members of the Stockholders' Committee and representatives of stockholders of the Federal

Petitioners' Exhibit No. 2-27-50-2—(Continued)
Home Loan Bank of Los Angeles, and much correspondence, all relating to the matters herein mentioned.

The total time spent by affiant during the month of April, 1947, in the matters above-outlined, was 96.2 hours.

During the month of May, 1947, affiant had many conferences with members of the Federal Home Loan Bank Committee and with officers of stockholders of the Federal Home Loan Bank of Los Angeles, with regard to the hearing of the appeal in the Long Beach case by the United States Supreme Court, and as to steps to be taken by the Federal Home Loan Bank of Los Angeles upon the Supreme Court of the United [186] States deciding such appeal, and with regard to pending Congressional Legislation for the restoration of the Federal Home Loan Bank of Los Angeles and amendments to the Federal Home Loan Bank Act. He had many telephone calls to and from associate counsel, and counsel in the Long Beach association case, and wrote and received many letters, all concerning the matters herein mentioned.

The total time spent by affiant during the month of May, 1947, in the matters above outlined, was 12.1 hours.

During the month of June, 1947, affiant received and studied a copy of the United States Supreme Court opinions deciding the appeal in the Long Beach association case, and denying the petition for writs of mandamus and/or prohibition as to the

Petitioners' Exhibit No. 2-27-50-2—(Continued)
allowance of attorneys' fees and expenses in the Long Beach association case. He had telephone conferences with Mr. Works concerning the United States Supreme Court opinions in the Long Beach association case.

He received and studied a copy of the President's Reorganization Plan No. 3 of 1947, providing for reorganization of the Federal Home Loan Bank Administration, and for a three-man Home Loan Bank Board instead of a single Federal Home Loan Bank Commissioner. He had many conferences with members of the Stockholders' Committee and with officers of stockholders of the Federal Home Loan Bank of Los Angeles concerning Reorganization Plan No. 3 and its effect on the re-establishment of the Federal Home Loan Bank of Los [187] Angeles.

He prepared resolutions to be offered by members of the Stockholders' Committee at a meeting of stockholders of the Federal Home Loan Bank of San Francisco to be held on July 28, 1947, declaring said Federal Home Loan Bank of San Francisco to have been unlawfully created. He had innumerable telephone conferences with members of the Stockholders' Committee and others, and much correspondence, all relating to the matters herein mentioned.

The total time spent by affiant during the month of June, 1947, in the matters above outlined, was 13.1 hours.

During the month of July, 1947, affiant had

Petitioners' Exhibit No. 2-27-50-2—(Continued)
lengthy conferences with Messrs. Works and Whyte and with counsel for other litigants. He attended with Messrs. Works and Whyte, a lengthy meeting of the Stockholders' Committee at which the effect of the United States Supreme Court decision in the Long Beach Association case and other matters affecting the pending litigation were considered.

He prepared a bulletin to be sent out by the Stockholders' Committee concerning the United States Supreme Court decision in the Long Beach Association case.

He had many telephone calls to and from stockholders of the Federal Home Loan Bank of Los Angeles with regard to the meeting of stockholders of the Federal Home Loan Bank of San Francisco to be held in San Francisco on July 28, [188] 1947. He conferred at length with members of the Stockholders' Committee, prior to the meeting of stockholders of the Federal Home Loan Bank of San Francisco. He attended the meeting of stockholders of the Federal Home Loan Bank of San Francisco held in San Francisco on July 28, 1947.

In addition he had many telephone calls and much correspondence with members of the Stockholders' Committee, and with representatives of stockholders of the Federal Home Loan Bank of Los Angeles, all relating to the matters herein mentioned.

The total time spent by affiant during the month of July, 1947, in the matters above outlined, was 39.1 hours.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

During the month of August, 1947, affiant had lengthy conferences with his associate counsel and with counsel for the Long Beach association with reference to opposition of the defendant Fahey, et al., to the interventions filed in the Long Beach case, whereby trust deeds held by the Long Beach association were reconveyed; also with reference to substituting members of the Home Loan Bank Board as parties defendant in the litigation. He also had many telephone conferences with his associate counsel and with counsel for the Long Beach association with regard to the above-mentioned matters.

He collaborated with his associate counsel in the preparation of a motion for substitution of the Home Loan Bank [189] Board members as defendants in the Federal Home Loan Bank of Los Angeles case. He had many telephone calls, to and from, and much correspondence with, members of the Stockholders' Committee and others concerning the matters herein mentioned.

The total time spent by affiant during the month of August, 1947, in the matters above outlined, was 9.4 hours.

During the month of September, 1947, affiant had conferences with his associate counsel and with attorneys for the Long Beach association, with regard to the substitution of members of the Home Loan Bank Board as parties defendant in the pending litigation.

He conferred with his associate counsel concern-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
ing the answer to be made by the Federal Home Loan Bank of Los Angeles to intervention proceedings in the pending litigation. He examined and signed approval as to form of the above-entitled Court's order denying a stay of that court's order allowing attorneys' fees.

He conferred with Mr. Whyte concerning a plan for reestablishment of the Federal Home Loan Bank of Los Angeles, which officials of the Home Loan Bank Board requested be prepared. He prepared an outline of the problems involved in the preparation of such a plan.

He conferred with members of the Stockholders' Committee, and had many telephone calls to and from members of the Committee and others, and wrote and received many letters, [190] all concerning the matters herein mentioned.

The total time spent by affiant during the month of September, 1947, on the matters above outlined, was 26.7 hours.

During the month of October, 1947, affiant considered the problems involved in a plan for restoration of the Federal Home Loan Bank of Los Angeles, and had many conferences with his associate counsel concerning such a plan. He collaborated with his associate counsel in the preparation of such a plan.

He had many conferences with attorneys for the Long Beach association with regard to problems in connection with titles to properties covered by

Petitioners' Exhibit No. 2-27-50-2—(Continued)
trust deeds held by the Long Beach association, and with regard to the Federal Home Loan Bank of Los Angeles, asserting its claims to deeds of trust deposited by the conservator of the Long Beach association as collateral to loans made to him by the Federal Home Loan Bank of San Francisco.

Affiant and Mr. Fussell attended a meeting of the Stockholders' Committee, at which a plan for restoration of the Federal Home Loan Bank of Los Angeles was considered.

He had innumerable telephone conferences with his associate counsel, with attorneys for the Long Beach association and with members of the Stockholders' Committee and much correspondence concerning the matters herein mentioned. [191]

The total time spent by affiant during the month of October, 1947, in the matters above outlined, was 54.7 hours.

During the month of November, 1947, affiant attended the hearing before the above-entitled Court, on November 3, 4, 6, 7 and 10, 1947, of various motions of the defendants which were denied on November 10, 1947. He studied a transcript of the Court's decision on defendants' motions to dismiss, etc.

He conferred with Messrs. Works and Whyte, and with counsel for the defendant, Federal Home Loan Bank of San Francisco, with regard to his proposal to abate the cross-claim of the Federal Home Loan Bank of Los Angeles against the Fed-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
eral Home Loan Bank of San Francisco filed in
the Long Beach case.

He collaborated with his associate counsel in the preparation of a memorandum of points and authorities in connection with the various motions filed by the defendants.

He studied a draft of points and authorities in opposition to the motion of the Federal Home Loan Bank of San Francisco to dismiss the Federal Home Loan Bank of Los Angeles case prepared by Mr. Whyte.

He prepared a bulletin sent out by the Stockholders' Committee reporting the decisions of Judge Hall in the pending litigation.

He had innumerable telephone conversations with his [192] associate counsel, members of the Stockholders' Committee and others, and much correspondence, all relating to the matters mentioned herein.

The total time spent by affiant during the month of November, 1947, in the matters above outlined, was 40.8 hours.

During the month of December, 1947, affiant received and studied a copy of plaintiffs' first amended and supplemental complaint in the Long Beach association case. He received and examined various notices of motions, applications for, and orders, extending time, a notice of appeal from orders requiring deposit of notes, deeds of trust, etc., and an order extending defendants' time to

Petitioners' Exhibit No. 2-27-50-2—(Continued)
plead to plaintiffs' first amended and supplemental complaint in the Long Beach case.

Affiant had many telephone calls to and from his associate counsel, members of the Stockholders' Committee and others, relating to the matters herein mentioned.

The total time spent by affiant during the month of December, 1947, in the matters above outlined, was 5.3 hours.

During the month of January, 1948, affiant conferred with Mr. Whyte in preparation for arguments on January 12, 1948, of defendants' motions to dismiss, etc., the Bank case.

He obtained data as to the number of stockholders of the Federal Home Loan Bank of Los Angeles at the time it [193] was seized, and as to its dividend record from its organization down to the time of its seizure.

He attended the hearing of the defendants' motions to dismiss, etc., the bank case, which were continued to March 22, 1948, at the request of attorneys for the defendants.

He conferred with members of the Stockholders' Committee with reference to the resolution of the Home Loan Bank Board adopted about January 17, 1948, restoring the Long Beach association to its management.

He had innumerable telephone calls from members of the Stockholders' Committee, from representatives of stockholders of the Los Angeles bank and from many others concerning the restora-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
tion of the Long Beach association, and the prospects for restoration of the Federal Home Loan Bank of Los Angeles.

He had several lengthy telephone conferences with Mr. Whyte concerning the petition filed by the Long Beach association for an order of the above-entitled court, returning the Long Beach association to its management, and the attorneys for the Federal Home Loan Bank of Los Angeles signing a waiver of notice of hearing of such petition.

He conferred with members of the Stockholders' Committee concerning the restoration of the Long Beach association. He prepared a bulletin sent out by the Stockholders' [194] Committee, informing the stockholders of the Federal Home Loan Bank of Los Angeles of the restoration of the Long Beach association.

He received and studied a copy of the court's order restoring the Long Beach association and of the order appointing a special master to supervise such restoration. He conferred with members of the Stockholders' Committee and Mr. Whyte concerning possible restoration of the Los Angeles bank by the Home Loan Bank Board.

The total time spent by affiant during the month of January, 1948, in the matters above outlined, was 25.3 hours.

During the month of February, 1948, affiant had lengthy conferences with Mr. Whyte with reference to a petition for an order to show cause why the Federal Home Loan Bank of San Francisco should

Petitioners' Exhibit No. 2-27-50-2—(Continued)
not be required to deposit with the court, the notes and deeds of trust held by the bank as collateral.

He had many telephone conferences with members of the Stockholders' Committee concerning the proposed restoration of the Federal Home Loan Bank of Los Angeles by the Home Loan Bank Board.

He attended a meeting of the Stockholders' Committee, at which the proposed plan for restoration of the Los Angeles bank was considered and the Long Beach association [195] order to show cause why all notes and deeds of trust held by the San Francisco bank as collateral to loans made to the conservator of that association should not be deposited in court was also considered.

Affiant had many telephone conversations with members of the Stockholders' Committee with reference to a proposed meeting to be held by members of the Stockholders' Committee with members of the Home Loan Bank Board, in Washington, D. C., concerning restoration of the Federal Home Loan Bank of Los Angeles.

He drafted a suggested resolution to be adopted by the Home Loan Bank Board restoring the Federal Home Loan Bank of Los Angeles and conferred with Mr. Whyte on the draft of such suggested Home Loan Bank Board resolution. He revised said draft and thereafter conferred with Mr. Fussell on the second draft of said resolution.

He left Los Angeles late in February, 1948, with certain members of the Stockholders' Committee

Petitioners' Exhibit No. 2-27-50-2—(Continued)
for a conference in Washington, D. C., with the members of the Home Loan Bank Board on the restoration of the Los Angeles Bank, and while en route there conferred with said members of the Stockholders' Committee concerning such conference.

He participated in a conference among members of the Home Loan Bank Board, their attorneys, attorneys for the Long Beach association, attorneys for the Federal Home Loan [196] Bank of San Francisco and others in Washington, D. C.

He spent about 10 days on said trip to Washington, D. C.

In addition to said matters, affiant had many telephone conferences with his associate counsel, members of the Stockholders' Committee and much correspondence concerning the matters herein mentioned.

The total time spent by affiant during the month of February, 1948, in the matters above outlined, was 85.9 hours.

During the month of March, 1948, affiant conferred with Messrs. Fussell, Works and Whyte concerning the conferences with the Home Loan Bank Board members in Washington, D. C., as to restoration of the Los Angeles Bank.

He studied the draft prepared by Mr. Whyte of the return of the Federal Home Loan Bank of Los Angeles to the order to show cause, obtained by the Long Beach association, why the \$6,300,000 of

Petitioners' Exhibit No. 2-27-50-2—(Continued)
promissory notes executed by the conservator of the Long Beach association to the Federal Home Loan Bank of San Francisco, and the collateral securing the same, should not be deposited in court.

He conferred with members of the Stockholders' Committee on the conferences in Washington, D. C., with the members of the Home Loan Bank Board and others.

He attended a meeting of the Stockholders' Committee, at which reports were made as to the conferences with the Home Loan Bank Board members and others. [197]

He conferred with Messrs. Works and Whyte, with regard to the proposed restoration of the Federal Home Loan Bank of Los Angeles.

On March 8, 1948, he attended an all day hearing in the above-entitled court of the Long Beach association's order to show cause above mentioned.

He conferred with Messrs. Fussell, Works and Whyte, and with counsel for other litigants with regard to proposals for a stipulation as to the deposit of money and collateral in court on the Long Beach association's order to show cause. On March 10, 1948, he attended a further all day hearing on the Long Beach association's order to show cause.

He had several telephone conferences with associate counsel with regard to a proposed stipulation as to the investment of cash belonging to the Long Beach association on deposit with the court.

He considered and signed a waiver of notice of hearing of a petition for and an approval of an

Petitioners' Exhibit No. 2-27-50-2—(Continued)
order of the court permitting the court's special master in the Long Beach association case to attend a meeting of the board of directors of the San Francisco Bank to be held in Salt Lake City.

He drafted a suggested resolution of the Home Loan Bank Board restoring the Los Angeles Bank, embodying therein suggestions resulting from the conference, in [198] Washington, D. C., with members of the Home Loan Bank Board and others, and he conferred with Messrs. Fussell, Works and Whyte as to said draft.

He had a long distance telephone conference among members of the Stockholders' Committee and Mr. Fussell, concerning Stockholders' Committee's position on the proposals made by the San Francisco Bank for restoration of the Los Angeles Bank.

He had a further conference with Messrs. Fussell, Works and Whyte as to the suggested Home Loan Bank Board resolution restoring the Los Angeles Bank.

He had a lengthy telephone conference with counsel for the Home Loan Bank Board, concerning the proposals of the San Francisco Bank for restoration of the Los Angeles Bank. He had lengthy conferences with members of the Stockholders' Committee concerning said proposals. He conferred with Messrs. Fussell and Whyte concerning said proposals. He attended a meeting of the Stockholders' Committee, at which said proposals were considered.

He received and examined the notice of motion,

Petitioners' Exhibit No. 2-27-50-2—(Continued)
and motion, of the Long Beach association with regard to releasing from the deposit in court certain collateral in excess of that needed to secure the \$6,300,000 of promissory notes deposited. He had a telephone conference with Messrs. Whyte and Works with regard to the attorneys for [199] the Los Angeles Bank consenting to such an order being made by the court.

The total time spent by this affiant during the month of March, 1948, in the matters above outlined, was 68.4 hours.

During the month of April, 1948, affiant had many telephone conferences with members of the Stockholders' Committee concerning the proposals for restoration of the Federal Home Loan Bank of Los Angeles, the appointment of a sub-committee of the Stockholders' Committee to confer with a committee of directors of the San Francisco Bank on such proposals, and a meeting of the sub-committee of the Stockholders' Committee, with the board of directors of the Federal Home Loan Bank of San Francisco at Salt Lake City.

He had a lengthy conference with counsel for other litigants concerning plans for restoration of the Los Angeles Bank, and the taking of a vote of stockholders of the Los Angeles Bank as to its restoration.

He attended a meeting of officers of stockholders of the Los Angeles Bank, and thereat reported the status of pending litigation, and of proposals for restoration of the Los Angeles Bank.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

He prepared a report of the Stockholders' Committee, to be sent to all stockholders of the Los Angeles Bank and [200] others, as to the negotiations for the restoration of the Los Angeles Bank. In addition, he had much correspondence and many telephone calls to and from members of the Stockholders' Committee and others, concerning the matters herein mentioned.

The total time spent by affiant during the month of April, 1948, in the matters above outlined, was 21.3 hours.

During the month of May, 1948, affiant received and studied copies of the answer of the Federal Home Loan Bank of San Francisco to the complaint of the Federal Home Loan Bank of Los Angeles. He also received and studied a copy of the answer of the San Francisco Bank to the cross-claim of the Los Angeles Bank filed in the Long Beach association case.

He had a telephone conference with Mr. Whyte with regard to substituting the new Home Loan Bank Board members as parties defendant in the Bank case.

He had many telephone conferences with members of the Stockholders' Committee concerning statements made by the Home Loan Bank Board that resolutions would be adopted by that board restoring the Federal Home Loan Bank of Los Angeles.

He conferred with members of the Stockholders' Committee concerning substitution of Home Loan

Petitioners' Exhibit No. 2-27-50-2—(Continued)
Bank Board member as [201] parties defendant in the litigation.

He had a lengthy conference with members of the Stockholders' Committee concerning the proposed restoration of the Los Angeles Bank and concerning the obtaining of an expression of the views of the stockholders of the Federal Home Loan Bank of Los Angeles with regard to its restoration.

He prepared a form of ballot, for voting on the dissolution of the Federal Home Loan Bank of San Francisco and restoration of the Federal Home Loan Bank of Los Angeles, to be sent to stockholders of the Federal Home Loan Bank of Los Angeles, as to their desires for restoration of the Los Angeles Bank, and he conferred at length with Mr. Whyte as to such ballot. He prepared a form of letter from the Stockholders' Committee transmitting the ballot to stockholders of the Los Angeles Bank.

In addition, he had many telephone calls to and from his associate counsel, counsel for the Long Beach association, members of the Stockholders' Committee and others, all relating to the matters herein mentioned. He also had much correspondence concerning these matters.

The total time spent by affiant during the month of May, 1948, in the matters above outlined, was 22.8 hours.

During the month of June, 1948, affiant conferred with Messrs. Fussell, Works and Whyte

Petitioners' Exhibit No. 2-27-50-2—(Continued)
concerning the use of the ballots cast by stockholders of the Federal Home Loan Bank [202] of Los Angeles.

He spent many hours in research of questions of law as to the effect of the ballots cast by the stockholders of the Federal Home Loan Bank of Los Angeles, and he conferred with his associate counsel, Messrs. Fussell, Works and Whyte, as to further steps to be taken in the litigation.

He received and studied a copy of the supplemental cross-claim files by the Long Beach association.

He conferred for many hours with counsel for the Home Loan Bank Board, concerning plans for restoration of the Los Angeles Bank. He attended a meeting of the Stockholders' Committee, at which counsel for the Home Loan Bank Board was present, during which methods of restoration of the Los Angeles Bank were discussed.

He drafted a letter from attorneys for the Los Angeles Bank to the directors of the San Francisco Bank, advising them that they would be held personally liable if they used funds of the Los Angeles Bank to resist its restoration.

He attended a conference of various members and officials of the Home Loan Bank Board, and members of the Stockholders' Committee held in Coronado, California, concerning restoration of the Los Angeles Bank.

He conferred with counsel for the Home Loan

Petitioners' Exhibit No. 2-27-50-2—(Continued)
Bank Board at Coronado, concerning methods of accomplishing the proposed [203] restoration of the Los Angeles Bank.

He had many telephone conferences with members of the Stockholders' Committee concerning the proposals made by the Home Loan Bank Board members and their counsel.

He conferred with Messrs. Fussell, Works and Whyte concerning new proposals made by the Home Loan Bank Board members as to the restoration of the Los Angeles Bank and had a long telephone conference with counsel for the Home Loan Bank Board on the new proposals for restoration of the Los Angeles Bank.

He was engaged in research of questions of liability of directors in effecting compromise settlements and conferred with Mr. Whyte thereon.

The total time spent by affiant during the month of June, 1948, in the matters above outlined, was 45.9 hours.

During the month of July, 1948, affiant prepared a draft of a proposed settlement disposing of the above-entitled consolidated actions, embodying therein the proposals discussed with counsel for the Home Loan Bank Board.

He conferred with his associate counsel, Messrs. Fussell and Whyte, concerning said settlement.

He conferred with Messrs. Fussell and Whyte concerning an opinion to be rendered as to the personal liability of directors of the Federal Home

Petitioners' Exhibit No. 2-27-50-2—(Continued)

Loan Bank of Los Angeles if a compromise settlement of the litigation be effected. [204]

He had a lengthy telephone conference with counsel for the Home Loan Bank Board in Washington, D. C., concerning the proposed settlement.

He had a long telephone conference with Mr. Whyte concerning the hearing before the above-entitled court on July 6, 1948, at Fresno, California.

He conferred with one of the attorneys for the Federal Home Loan Bank of San Francisco, concerning said proposed settlement.

He had many conferences with one of the attorneys for the Home Loan Bank Board, concerning the proposed settlement.

He received and studied a copy of the petition of the Long Beach Association for an order to show cause why the Federal Home Loan Bank of San Francisco should not be dissolved.

He collaborated with his associate counsel in the preparation of the answer of the Federal Home Loan Bank of Los Angeles to the amended and supplemental cross-claim of the Long Beach association.

He had a lengthy conference with Messrs Fussell and Whyte, at which a draft of the opinion on the liability of directors of the Los Angeles Bank, in the event a compromise settlement of the litigation be effected, was studied and corrected.

He had a lengthy conference with attorneys for the [205] Long Beach association concerning the proposed settlement.

He conferred with Mr. Fussell as to the proposed

Petitioners' Exhibit No. 2-27-50-2—(Continued)
settlement, and suggestions with regard thereto made by attorneys for the Long Beach association.

He had a lengthy conference with one of the attorneys for the Home Loan Bank Board, during which said proposed settlement was redrafted.

He had a telephone conference with a member of the Stockholders' Committee concerning the action commenced by ten savings and loan associations in the United States District Court for the Northern District of California at San Francisco.

He had many telephone conferences with members of the Stockholders' Committee, his associate counsel, counsel for the Long Beach association, and counsel for the Home Loan Bank Board and others concerning said suit.

He had many telephone conferences with his associate counsel and with attorneys for the Long Beach association concerning the petition of the Long Beach association for a temporary restraining order and an injunction pendente lite against the maintenance of said action.

He attended a hearing before the above-entitled Court, at which the petition for a temporary restraining order and an injunction pendente lite against said action, brought by said ten associations, was presented, and a [206] temporary order restraining further proceedings in said case was obtained.

He attended a meeting of the Stockholders' Committee, at which meeting various members and

Petitioners' Exhibit No. 2-27-50-2—(Continued)
officials of the Home Loan Bank Board were present, and at which said action instituted in the United States District Court for the Northern District of California, and the proposed settlement of the litigation, were considered.

He conferred with Mr. Fussell and with counsel for other litigants concerning said suit in the United States District Court for the Northern District of California, and the proposed settlement of the pending litigation.

He attended the hearing before the above-entitled Court on the petition of the Long Beach association for an injunction pendente lite against the maintenance of said San Francisco suit, which injunction was granted.

In addition, he had innumerable telephone calls to and from members of the Stockholders' Committee, his associate counsel, counsel for the Long Beach association and many others and had much correspondence, all relating to the matters herein mentioned.

The total time spent by affiant during the month of July, 1948, in the matters above outlined, was 87.2 hours

During the month of August, 1948, affiant had a great many conferences with members of the Stockholders' Committee, [207] with one of the attorneys for the Home Loan Bank Board, with affiant's associate counsel and with counsel for the Long Beach association concerning the proposed settlement of

Petitioners' Exhibit No. 2-27-50-2—(Continued)
the pending litigation. He redrafted the documents relating to proposed settlement.

He arranged for, and had, a conference in Oakland, California, with the attorneys for the ten associations, which filed the action in the United States District Court for the Northern District of California, concerning the proposed settlement of the pending litigation.

He arranged for, and had, a conference in San Francisco, California, with one of the attorneys for the San Francisco Bank, one of the attorneys for the Home Loan Bank Board and Mr. Fussell, concerning the proposed settlement and the documents relating thereto. He redrafted the documents setting up the proposed settlement to incorporate changes made therein during said conference.

He received and studied a copy of the answer of defendant R. E. Hegg, to the amended and supplemental cross-claim of the Long Beach association.

He received and studied a circular letter to the stockholders of the Los Angeles Bank mailed by attorneys for the ten plaintiff associations in the San Francisco suit.

He had many conferences with counsel for the Home Loan Bank Board concerning the proposed settlement of the pending [208] litigation.

He again redrafted the documents relating to the proposed settlement, and arranged for his attendance at, and attended, a meeting of the board of directors of the San Francisco Bank, held in Se-

Petitioners' Exhibit No. 2-27-50-2—(Continued)
attle on August 25, 1948, at which said proposed settlement was considered.

He collaborated with his associate counsel in the preparation of the return of the Federal Home Loan Bank of Los Angeles to the Long Beach association's order to show cause why the San Francisco Bank should not be dissolved.

He attended, with Mr. Fussell, a meeting of the Stockholder's Committee held.

He received from counsel for the Home Loan Bank Board and studied, a copy of a proposed resolution of the Home Loan Bank Board restoring the Los Angeles Bank.

In addition, he had innumerable conferences with, and telephone calls to and from, members of the Stockholders' Committee, his associate counsel, attorneys for the Long Beach association, counsel for the Home Loan Bank Board and many others, all relating to the matters herein mentioned.

The total time spent by affiant during the month of August, 1948, in the matters above outlined, was 96.1 hours.

During the month of September, 1948, affiant had many [209] telephone conferences with Messrs. Fussell, Whyte, counsel for the Home Loan Bank Board, counsel for other litigants and others, with regard to the proposed resolution of the Home Loan Bank Board restoring the Los Angeles Bank.

He attended a meeting of the Stockholders' Committee held at Santa Barbara, California.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

He attended the hearing before the above-entitled Court of the motion of the Long Beach association for an order restraining the meeting of stockholders of the Federal Home Loan Bank of San Francisco, to be held in Sun Valley, Idaho, on September 20, 1948, from taking action upon the proposed restoration of the Los Angeles Bank.

He conferred with Mr. Fussell concerning preparations for trial of the pending litigation.

He received copies of, and studied the statements of the Long Beach association in opposition to the motion of the ten association plaintiffs in the San Francisco suit, and of the Home Loan Bank Board to dismiss the Long Beach association's amended and supplemental cross-claim.

He received and studied the statement, and points and authorities, filed by the plaintiffs in the Long Beach association case, in opposition to the motion of the Home Loan Bank Board to dismiss the Long Beach association's cross-claim.

He had innumerable telephone conferences with members [210] of the Stockholders' Committee, his associate counsel, with counsel for the Long Beach association, with counsel for the Home Loan Bank Board and many others, and he had much correspondence, all relating to the matters herein mentioned.

The total time spent by affiant during the month of September, 1948, in the matters above outlined, was 47.4 hours.

During the month of October, 1948, affiant had

Petitioners' Exhibit No. 2-27-50-2—(Continued)
many telephone conferences with his associate counsel, with members of the Stockholders' Committee and others, concerning a proposed hearing to be held by the Home Loan Bank Board on the restoration of the Federal Home Loan Bank of Los Angeles. He had a lengthy conference with counsel for other litigants concerning such hearing.

He had a conference with Messrs. Works and Whyte concerning such proposed hearing, and a further conference with Messrs. Whyte and counsel for other litigants concerning said proposed hearing. He had a long telephone conference with counsel for the Home Loan Bank Board in Washington, D. C., concerning said proposed hearing. He had many telephone conferences with members of the Stockholders' Committee, and much correspondence with members of the Stockholders' Committee and others, concerning said proposed hearing. [211]

He attended the two-day hearing of the motion of the Long Beach association, joined by the Federal Home Loan Bank of Los Angeles for inspection of the books and records of the Federal Home Loan Bank of San Francisco.

He conferred with counsel for other litigants, Mr. Whyte and others concerning a new proposal for restoration of the Los Angeles and Portland Banks.

He had a great many telephone conferences with members of the Stockholders' Committee and with his associate counsel concerning such proposal.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

He obtained the approval of the United States District Attorney's office of the form of the court's order for preliminary inspection of the books and records of the Federal Home Loan Bank of San Francisco, and obtained the signature of Judge Hall thereto, and filed the same.

He attended the hearing before Special Master Walker at the Los Angeles offices of the Federal Home Loan Bank of San Francisco, at which a preliminary inspection of books and records of that office of the bank was made, and studied the transcript of said hearing.

The total time spent by affiant during the month of October, 1948, in the matters above outlined, was 86.5 hours.

The legal services necessarily performed by affiant from and after October 31, 1948, to and including the date [212] of filing hereof, have not as yet been calculated.

The total time spent by affiant from March 29, 1946, to October 31, 1948, inclusive, on the matters herein mentioned, amounts to 1645.5 hours, equal to 274 six-hour working days. Affiant spent 27 twenty-four-hour days away from Los Angeles, where his office is located, on three trips to San Francisco, one each to Fresno, California, and Seattle, Washington, and two trips to Washington, D. C.

The hours stated above to have been spent upon the matters hereinabove set forth are based upon daily time sheets kept by affiant.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

Affiant estimates that during the time covered by this affidavit he has had in excess of 2500 telephone conversations and has written over 175 letters. Affiant during said time prepared so many papers, reports and memoranda, that it is impossible for him to enumerate them, or to estimate their number.

No attorneys' fees have heretofore been paid or allowed to Messrs. O'Melveny & Myers, and Richard FitzPatrick, Esq., or any of them, on account of their legal services rendered in Civil Action 5678-PH(WM) and in Civil Action 5421-PH, except as follows: [213]

Date	To Whom Paid	Amount	
7/31/1946	Richard FitzPatrick	\$2500.00	
2/18/1948	Richard FitzPatrick	2500.00	\$5,000.00
10/15/1946	O'Melveny & Myers	\$2500.00	
2/17/1948	O'Melveny & Myers	2500.00	\$5,000.00

Wherefore, your affiant prays that the above-entitled Court make and enter the order specified on Pages 2 and 3 of the motion to which this affidavit is attached.

/s/ RICHARD FITZ PATRICK.

Subscribed and sworn to before me this 4th day of January, 1949.

[Seal] /s/ RAYMOND A. NELSON,
Notary Public in and for Said
County and State. [214]

* * *

PETITIONERS' EXHIBIT No. 2-27-50-4

O'MELVENY & MYERS,

433 South Spring Street,
Los Angeles 13, California,
Michigan 2611. [248]

RICHARD FITZ PATRICK,

1400 C. C. Chapman Building,
Los Angeles, California,
Tucker 1576.

Attorneys for Plaintiffs in Civil Action No.
5678-PH (WM) and for Defendant,
Third-Party Defendant, Cross-Claimant
and Cross-Defendant FHLB of L. A., a
Body Corporate, in Civil Action No.
5421-PH.

In the District Court of the United States for the
Southern District of California, Central Division
Civil Action No. 5679-PH (WM) (Consolidated
With Civil Action No. 5421-PH)

FEDERAL HOME LOAN BANK OF LOS AN-
GELES, a Body Corporate, et al.,
Plaintiffs,

vs.

FEDERAL HOME LOAN BANK OF PORT-
LAND, Sometimes Known and Referred To as
Federal Home Loan Bank of San Francisco,
a Body Corporate, et al.,
Defendants.

Petitioners' Exhibit No. 2-27-50-4—(Continued)

PAUL MALLONEE, et al.,

Plaintiffs,

vs.

JOHN F. FAHEY, et al.,

Defendants.

AFFIDAVIT OF RICHARD FITZ PATRICK
IN SUPPORT OF MOTION FOR ORDER
DIRECTING PAYMENT OF ATTORNEYS'
FEES ON ACCOUNT

State of California,

County of Los Angeles—ss.

Richard FitzPatrick, being first duly sworn,
says:

He is now, and at all times herein mentioned has been, one of the attorneys for the Federal Home Loan Bank of Los Angeles (sometimes hereinafter referred to as "Los Angeles Bank"), one of the plaintiffs in action numbered 5678-PH (WM) and defendant, third-party defendant, cross-claimant and cross-defendant in action numbered 5421-PH, and for the following named association plaintiffs in action numbered 5678-PH (WM): Coast Federal Savings and Loan Association, Standard Federal Savings and Loan Association, Central Building and Loan Association, State Savings and Loan Association, Los Angeles American Savings and Loan Association, and that he is also one of the

Petitioners' Exhibit No. 2-27-50-4—(Continued)
attorneys for the Stockholders' Committee of the
Federal Home Loan Bank of Los Angeles.

This affidavit is made in support of the motions of said Los Angeles Bank and said association plaintiffs above named for an order directing payment of attorneys' fees on account and for an order directing repayment of moneys heretofore advanced by Shareholders' Protective Committee filed herein on January 6, 1949, and the supplements thereto filed herein on July 8, 1949, and for the purpose of countering the affidavits of J. Francis Moore and Ernest E. Reardon attached [250] to the memorandum in opposition to motions for orders directing payment of attorneys' fees on account and repayment of moneys advanced, and the supplements thereto, which memorandum was filed herein on September 23, 1949, by the defendants Home Loan Bank Board, its members, A. V. Ammann as Conservator and the Federal Savings and Loan Insurance Corporation.

Affiant was present at a meeting of California savings and loan executives and employees held in San Francisco, California, on the evening of April 30, 1946. Harland G. Keller, then one of three assistant governors of the Federal Home Loan Bank System, addressed said meeting for the purpose of presenting the Federal Home Loan Bank Administration's side of the controversy over the liquidation and reorganization of the Los Angeles Bank and its merger into the Federal Home Loan

Petitioners' Exhibit No. 2-27-50-4—(Continued)

Bank of Portland, hereinafter referred to as the Portland Bank.

Harland G. Keller then and there stated, in substance and effect as follows: The liquidation and reorganization of the Los Angeles Bank and its merger into the Portland Bank had been discussed by John H. Fahey, Federal Home Loan Bank Commissioner, Col. Harold Lee, Governor of the Federal Home Loan Bank System, himself and members of the staff of the Federal Home Loan Bank Administration for some time prior to March 29, 1946. It was effected on March 29, 1946, because of [251] the disagreement between the board of directors of the Los Angeles Bank and Commissioner Fahey as to the election of officers of the Los Angeles Bank. Commissioner Fahey had been faced with several alternatives as to what he could do in view of such controversy. One, he could remove the directors of the Los Angeles Bank, but they (Mr. Fahey, Col. Lee, Mr. Keller and members of the Federal Home Loan Bank Administration staff) believed that the stockholders of the Los Angeles Bank would either elect the same directors or others who would vote the same way as those who had been removed, and therefore removal of the directors would accomplish nothing. Two, the Commissioner could place a conservator in charge of the bank but he (the Commissioner) thought that eventually he would be forced to return the bank to the same directors so that the placing of a conservator in charge of the bank would accomplish

Petitioners' Exhibit No. 2-27-50-4—(Continued)
nothing. The only other alternative, therefore, was to merge the Los Angeles Bank with the Portland Bank, and that is what the Commissioner did.

Said Keller further stated at said meeting, in substance and effect as follows: Under normal conditions if there were to be a merger of the Los Angeles and Portland Banks, the Portland Bank would have been merged into the Los Angeles Bank, the larger of the two, but that under the circumstances of the controversy with the board of directors of the Los Angeles Bank, the Commissioner chose to merge the Los Angeles [252] Bank into the smaller Portland Bank.

The Federal Home Loan Bank Administration did not hold a hearing on the proposed merger of the Los Angeles Bank into the Portland Bank because the Administration knew that the Los Angeles Bank stockholders would oppose it, and perhaps block it by legal action or by protests in sufficient number as to make it impossible for the Administration to accomplish it and that was the reason for the manner in which the merger was effected.

On June 12, 1946, affiant was present at the hearing, before the Special Committee to Investigate Executive Agencies of the House of Representatives of the 79th Congress, of the complaints of the Los Angeles Bank and Long Beach Federal Savings and Loan Association against the Federal Home Loan Bank Administration. Affiant heard the testimony

Petitioners' Exhibit No. 2-27-50-4—(Continued)
given under oath by Harland G. Keller on June 12, 1946, at said hearing.

Said Keller then and there testified under oath, in substance and effect, as follows:

He was an Assistant Governor of the Federal Home Loan Bank System and had been such for about four and one-half years. John H. Fahey was the Federal Home Loan Bank Commissioner. Under the Commissioner was the Governor of the Federal Home Loan Bank System who was Col. Harold Lee, and under the Governor of the Federal Home Loan Bank System there were [253] three Assistant Governors and he was one of those three Assistant Governors.

He had been instructed by Col. Lee, Governor of the Federal Home Loan Bank System, to go to San Francisco to make arrangements for space necessary to house the Federal Home Loan Bank of San Francisco and also to make arrangements for telephone and other things that were necessary, and then to go to Portland, Oregon, to handle the details of the consolidation of the Los Angeles Bank and the Portland Bank. He left Washington, D. C., at 9:45 o'clock on the night of March 25, 1946.

He did not know who conceived of the organization of the Federal Home Loan Bank of San Francisco but he imagined that Mr. Fahey knows. There had been many discussions of the possibility of a Federal Home Loan Bank of San Francisco over a period of time before he had received instructions to proceed to San Francisco and arrange for the

Petitioners' Exhibit No. 2-27-50-4—(Continued)
housing of such a bank. He participated in such discussions with Mr. Fahey, Col. Lee and other members of the staff.

Officials of the Portland Bank were not informed of those instructions at that time; they were informed of them on the 27th and 28th of March, 1946.

He did not advise anybody in Los Angeles of that move. The Federal Home Loan Bank Administration considered the possibility that the Los Angeles Bank and its stockholders [254] might undertake to block such a move on the part of the Administration by litigation.

There had been discussions of many steps that the desperate group in Los Angeles, made up of several people attempting to control the Los Angeles Bank, might take. He considered he was discharging whatever obligation he had to the stockholders of the Los Angeles Bank in proceeding secretly under explicit instructions.

He addressed a meeting of the Northern Counties Savings and Loan Group of California after the merger of the banks was accomplished. He had been asked if he would appear at such meeting to present the Administration's side of this controversy because they had up to that time been favored with a one-sided story and he consented to appear.

He was asked by Mr. Fischbach, counsel for the Special Committee conducting said hearing, if he had been present while various statements were

Petitioners' Exhibit No. 2-27-50-4—(Continued)
made by witnesses which they attributed to him as having been made at said meeting.

The following questions were then asked of said Keller and were answered by him as follows:

Mr. Fischbach: Now, were the statements that were attributed by the various witnesses that you heard testify, to you, correct?

Mr. Keller: The statements of Mr. Gregory which he attributed to me, if I can remember them correctly, were [255] somewhat distorted.

Mr. Fischbach: Now, let's have your version of it.

Mr. Keller: I believe he said that I, in outlining the three possible approaches in connection with the dismissal of the directors, that I said that the same directors would be put back in. What I actually said was that we had no evidence that the leadership would change, and therefore would have no evidence that a new board would achieve anything.

I believe he said that a court would order the conservator to return the bank to the board. If I remember correctly, I stated that if a conservator was placed in there, in the course of time, it would have to be turned back to a California board, and again we would have no assurance that that board would have a different viewpoint or a different attitude than the present one.

Mr. Jennings (a member of the Committee): There is not much difference between what you said

Petitioners' Exhibit No. 2-27-50-4—(Continued)
and what he said. The difference between tweedle-
dum and tweedledee.

Said Keller further testified under oath at said hearing, in substance and effect, as follows:

There was no question of the solvency of the Los Angeles Bank, and there was no question of dishonesty or dereliction of duty, or improvidence in the management of the Los Angeles Bank. [256]

The following statements are made by affiant for the purpose of countering the statements in, and the inferences intended to be drawn from, the exhibits attached to the affidavit of Ernest E. Reardon attached to said memorandum in opposition to motions for orders directing payment of attorneys' fees on account and repayment of moneys advanced, filed herein by the Home Loan Bank Board, et al., on September 23, 1949.

The following set forth table, showing the surplus and undivided profits of the Federal Home Loan Bank of Portland, was prepared by affiant from figures shown in the statements of condition of that bank in its Year Books for the years 1939, 1940, 1941, 1942, 1944 and 1945, published by said bank and distributed by it to its members and to the public, and from the statement of condition of said bank, as of March 29, 1946, furnished affiant by said purported Federal Home Loan Bank of San Francisco, hereinafter referred to as the San Francisco Bank:

Petitioners' Exhibit No. 2-27-50-4—(Continued)

Comparative Table of Surplus and Undivided Profits of
the Federal Home Loan Bank of Portland

Date	Surplus and Undivided Profits	Increase	Per Cent Increase
Dec. 31, 1939.....	\$447,879.33		
Dec. 31, 1940.....	497,746.41	\$ 49,867.67	11.13
Dec. 31, 1949.....	617,935.73	120,189.32	24.15
Dec. 31, 1942.....	650,393.37	32,457.64	5.25
Dec. 31, 1943.....	717,084.70	66,691.33	10.25
Dec. 31, 1944.....	760,995.04	43,910.34	6.12
Mar. 29, 1946.....	926,977.48	165,982.44	21.81
		<hr/> \$479,098.15	106.97

As shown in the foregoing table, the surplus and undivided profits of the Portland Bank increased nearly 107% in [257] the six years and three months preceding the seizure of the Los Angeles Bank and its merger into the Portland Bank.

Subject to the conditions therein set forth, Sec. 6(g) of the Federal Home Loan Bank Act (12 USC 1646 (g)) provides for the retirement at par of capital stock of the Federal Home Loan Banks held by the United States.

The surplus and undivided profits of the Los Angeles Bank on March 29, 1946, amounted to \$1,941,330.49, as shown in a statement of condition of said bank furnished affiant by said San Francisco Bank. As shown by said statement, the Reconstruction Finance Corporation held on March 29, 1946, 99,679 shares of stock of the Los Angeles Bank of the par value of \$9,967,900.00. The members of said bank held 59,750 shares of the par value of \$5,971,500.00. The total number of shares of stock of said

Petitioners' Exhibit No. 2-27-50-4—(Continued)
bank outstanding on March 29, 1946, was 115,394 of the par value of \$15,939,400.00.

The book value per share of all outstanding stock of the Los Angeles Bank, including that of the Reconstruction Finance Corporation and of members (capital, surplus and undivided profits divided by the total number of shares outstanding) was \$112.18. The book value of the interest of each share in the surplus and undivided profits alone (surplus and undivided profits divided by the total number of shares outstanding) was \$12.18. The book value per share of the members' interest in the surplus and undivided profits alone [258] (surplus and undivided profits divided by the total number of members' shares outstanding) was \$32.51.

If the shares held by the Reconstruction Finance Corporation in the Los Angeles Bank on March 29, 1946, were retired at par, the book value of each share of stock held by the members (surplus and undivided profits divided by the total number of members' shares outstanding plus par value of such shares) would be \$132.51.

As shown by the statement of condition of the Portland Bank on March 29, 1946, the Reconstruction Finance Corporation held 59,600 shares of its stock of the par value of \$5,960,000.00. The members held 21,724 shares of the par value of \$2,172,400.00. The total number of shares outstanding was 81,324 of the par value of \$8,132,400.00.

The book value per share of all outstanding stock of the Portland Bank, including that of the Recon-

Petitioners' Exhibit No. 2-27-50-4—(Continued)

struction Finance Corporation and of members (capital, surplus and undivided profits divided by the total number of shares outstanding) was \$111.40. The book value of the interest of each share in the surplus and undivided profits alone (surplus and undivided profits divided by the total number of shares outstanding) was \$11.40. The book value per share of the members' interest in the surplus and undivided profits alone (surplus and undivided profits divided by the total number of members' shares outstanding plus the par value of such shares) would [259] be \$142.67.

The following table shows the book value of each share of the outstanding stock of the Los Angeles Bank and of the Portland Bank on March 29, 1946:

	Los Angeles Bank	Portland Bank
Book Value of Each Share.....	112.18	111.40

The following table shows the book value of each share of the stock of the Los Angeles Bank and of the Portland Bank on March 29, 1946, if the Reconstruction Finance Corporation stock in each bank were retired at par:

	Los Angeles Bank	Portland Bank
Book Value of Each Share.....	132.51	142.67

The greater book value of the members' stock of the Portland Bank, if the stock held by the Reconstruction Finance Corporation in that bank were retired at par, over the book value of the members' stock of the Los Angeles Bank, is due to the greater

Petitioners' Exhibit No. 2-27-50-4—(Continued)
 proportion of Reconstruction Finance Corporation
 stock held by the Portland Bank as shown below:

	Los Angeles Bank	Portland Bank
Per Cent of RFC Capital to		
Total Capital.....	62.5	73

/s/ RICHARD FITZ PATRICK.

Subscribed and sworn to before me this 5th day of
 January, 1950.

/s/ CHARLES E. TAINTOR,
 Notary Public in and for Said
 County and State. [260]

The Court: Now, what do you want to do about
 your affidavits of service here? There was an order
 directing a rather wide service. There is an affidavit
 of service and an affidavit of publication.

Mr. Works: Your Honor is referring to the
 notice of this hearing today?

The Court: That is correct.

Mr. Works: That should be in the record, by all
 means.

The Court: Do you offer it?

Mr. Works: I certainly do.

The Court: What exhibit number?

The Clerk: No. 5, your Honor.

The Court: Very well.

Mr. Works: There should be at least two affi-
 davits of publication.

The Court: There are two affidavits of publica-

tion and there is this long order here of service by mail. I do not find an affidavit of service on that, but the affidavit of publication filed by M. E. Kogler, Los Angeles Daily Journal and the Los Angeles News—it does not seem to have any page number in this record—dated the 6th of February, 1950, and filed February 7, 1950. That will be Exhibit 2-27-50-5, and the affidavit of publication of W. H. Kaplan, verified the 10th of February, 1950, by Mr. M. J. Levy, notary public, and filed February 13, 1950, in this court concerning publication [261] in the Daily Journal of Commerce, State of Oregon, County of Multnomah, will be in evidence as Exhibit 2-27-50-6.

(The documents referred to were received in evidence as Petitioners' Exhibit Nos. 2-27-50-5 and 2-27-50-6.)

The Court: Was there an affidavit of mailing filed?

Mr. Whyte: Both an affidavit of mailing filed and also an affidavit as to publication in the San Francisco Recorder, your Honor.

Mr. Works: How about Portland?

Mr. Whyte: He just read Portland.

The Court: This is Portland.

Is it in that file?

Mr. Whyte: I believe it is, your Honor.

The Court: These two affidavits of service need not be copied into the record, that is, the affidavit of publication.

Mr. Whyte: The affidavit of service by mail of

notice to this hearing upon all of the associations which were designated in the Exhibit A attached to the order.

The Court: That is the order filed January 31, 1950, containing a list 20 pages in length?

Mr. Whyte: That is correct, your Honor.

The Court: And the affidavit of service conforms with that order for mailing?

Mr. Whyte: That is true, your Honor.

The Court: It is the affidavit of whom? [262]

Mr. Whyte: That is the affidavit of Adrian Adams.

The Court: Dated or sworn to when?

Mr. Whyte: Sworn to on February 1, 1950.

The Court: Filed?

Mr. Whyte: Filed on the same date.

The Court: That will be Petitioner's Exhibit 2-27-50-7 and not be copied into the record.

(The document referred to was received in evidence as Petitioner O'Melveny & Myers and FitzPatrick Exhibit No. 2-27-50-7.)

Mr. Whyte: May I check just one moment, your Honor?

The Court: The other was an affidavit of service by mail.

Mr. Whyte: Your Honor, that affidavit of Adrian Adams was filed February 10, 1950.

The Court: Was that publication or service by mail?

Mr. Whyte: Service by mail upon the savings and loan associations.

The Court: Now the affidavit of publication in the San Francisco Recorder is when?

Mr. Whyte: I have not yet been able to locate that.

The Court: Let us look for it now while we are at it.

Mr. Works: Did your Honor make any direction with reference to the affidavit of mailing to the various associations?

The Court: I just made that. It is No. 6 and No. 7 is the last one. It is not to be incorporated in the transcript. [263] It will be admitted in evidence—or do you wish it incorporated in the transcript?

Mr. Works: I believe perhaps we should.

The Court: Very well. What exhibit number did I give it?

The Clerk: No. 7.

The Court: What pages in the record, so the reporter can find it when he comes to it?

Mr. Whyte: I don't see any.

The Court: He has not gotten to it yet. Very well. Let us see.

(The file referred to was passed to the court.)

The Court: This is not any portion of the record on appeal and has therefore not been numbered. This was 2-27-50-7, the affidavit of service by mail, Mr. Clerk?

The Clerk: That is right, filed on February 10th.

The Court: Filed February 10, 1950. And the affidavit of C. H. Lacassa, verified the 9th of

February, 1950, before Russell L. Thompson, showing service by publication in the San Francisco Recorder will be 2-27-50-8 and need not be copied, Mr. Works? The affidavit of service need not be copied in the transcript. It is in evidence as Exhibit 8. There are three affidavits of service by publication and I have not ordered them copied in the transcript.

Mr. Works: I don't think it is necessary, your Honor. [264] If they are in evidence they will be in the record in one form or another, I guess.

The Court: I think that is sufficient.

(The document referred to was received in evidence as Petitioner O'Melveny & Myers and FitzPatrick Exhibit No. 2-27-50-8.)

Mr. Gilbert: Your Honor, I just suggested to counsel, and submit it for what it may be worth, that with respect to these petitions for attorneys' fees that are covered by stipulation, that publication and service was duly made and ordered by the court. That will save the record that much and save looking for it through the record for those items.

Is that agreeable, Mr. Angell?

Mr. Angell: That is agreeable to counsel for the San Francisco Bank.

The Court: We have finished on the petition of Mr. Works.

Mr. Works: I would like to have such a stipulation in any event as far as the parties represented

here today are concerned. It will eliminate any question as far as we are concerned.

The Court: Is it so stipulated?

Mr. MacGuineas: There is a difficulty as far as the official defendants are concerned, your Honor, because we are asserting the position throughout that none——

The Court: Then it is not so stipulated. Let us get [265] on.

Mr. Works: Do you care to stipulate reserving all your rights under those defenses? That is all right with us.

Mr. MacGuineas: I am not sure what the effect of that would be.

Mr. Works: We will make it as painless as possible.

The Court: There does not appear to be any stipulation. Very well.

Now is there anything more in connection with the petition for attorneys' fees of O'Melveny & Myers and FitzPatrick?

Mr. Chapman: Yes, your Honor, there is for me.

The Court: I mean by way of evidence.

Mr. Chapman: That is what I am speaking of.

The Court: Very well.

Mr. Chapman: I ask leave to file a counter-affidavit. I have only had opportunity to read the San Francisco Bank's opposition which was served on me at 1:55 o'clock p.m. today, just before the start of the hearing, and in the exhibit there is a statement that the Long Beach Federal Savings and Loan Association exchanged 3417 shares of

stock of the Los Angeles Bank for stock of the San Francisco Bank. That statement is factually incorrect, and I ask leave to file an affidavit to show what the facts are.

There are other matters in that also that we would like to answer by counter-affidavit. I will have them filed tomorrow [266] morning when court opens.

Mr. Bishop: That is like the opposition, or alleged opposition, you filed today, and we reserve the same privilege, Mr. Chapman.

Mr. Chapman: If you want to file something by tomorrow morning, that is agreeable with me.

Mr. Bishop: I would move to strike it if I had my wishes about the matter, as scurrilous, not responsive and not a true and correct statement of the facts.

The Court: I do not know what you are talking about.

Mr. Bishop: We are having one of those usual—pardon me.

The Court: Except then for the permission, which is now granted to the Long Beach Federal Savings and Loan Association, to file counter-affidavits to the affidavits which were filed by the Federal Home Loan Bank today, that is, the affidavit of Bogardus——

Mr. Chapman: And the Frank Noon affidavit.

The Court: ——and the affidavit of Frank Noon, permission to file which counter-affidavit is granted until tomorrow morning at 12:00 o'clock noon.

Mr. Bishop: Have we the same privilege, your

Honor, in connection with Mr. Chapman's response to the First Federal's application that he served and filed today that we did not see until after 2:00 o'clock? [267]

Mr. Chapman: I served it at the same time you served yours, Mr. Bishop.

Mr. Bishop: But yours is 15 times longer.

The Court: This is not a verified affidavit.

Mr. Chapman: We didn't make any affidavits, merely a response.

The Court: It is merely a response.

Mr. Bishop: We would ask leave to file counter-affidavits to that response because it contains many statements of fact that are not correct.

Mr. Works: Mr. Bishop, was any of the material filed by you today intended to be used as opposition to our application?

Mr. Bishop: Yes, both affidavits.

Mr. Works: I see. There are some statements made in the material filed by the San Francisco Bank today with reference to several of the associations named in Case No. 5678——

The Court: I will settle it this way: With relation to the papers that were filed after the commencement and opening of court this afternoon, to wit, the response of plaintiffs Mallonee, et al., and third-party plaintiff and cross-claimant Long Beach Federal Savings and Loan Association to all applications re attorneys' fees, the answer in opposition to the Federal Home Loan Bank of San Francisco to the motion and order of the First Federal Savings and Loan Association of [268] Wil-

mington, dated February 10, 1950, and the affidavit of Irving Bogardus, all parties desiring to file any responsive affidavits thereto may have until 12:00 o'clock noon tomorrow to do so.

Mr. Works: We have to contact these associations, your Honor, and we would appreciate a little more time. The general purport of this is that they have been doing business with the San Francisco Bank and then the theory of estoppel is attempted to be set forth, I assume.

The Court: When can you get that information?

Mr. Works: I will defer to Mr. FitzPatrick on that. He is closer to the situation than I am.

Mr. Fitzpatrick: Some of these associations are in Alameda, another one of them is in Stockton, others are local, that is, in Los Angeles County.

The Court: Do you propose to communicate with the entire list set forth in Mr. Bogardus' affidavit?

Mr. FitzPatrick: I think it would be necessary to do so, your Honor, unless we make an indefinite allegation in our response.

Mr. Gilbert: Perhaps it would shorten it if Mr. Angell would produce——

Mr. FitzPatrick: Maybe we can do it by telephone.

The Court: As I read this affidavit, it sets forth in this list the name of the association by state, by city, the [269] stock held on 3-29-46, the date of seizure or date of creation or date of dissolution, whatever you call it, and the stock held 2-21-50, and the date of stock exchanged. I take it where there

is no date under that column there has been no exchange?

Mr. Bishop: That is correct.

Mr. Angell: That is correct.

The Court: Therefore to verify this it would be necessary for you to communicate only to those having listed in the column where date of stock exchanged is shown, which seems to me could be done by telegraph tonight—there are probably about 125 of these—and a telegram could be back here by the following day, Wednesday, so that I will extend the time of the application on O'Melveny & Myers and FitzPatrick to file their response to the affidavit of Mr. Bogardus until 5:00 o'clock Wednesday.

Mr. Works: That is fine. May that include the matter set forth in Mr. Noon's affidavit?

The Court: As well as the matter set forth in Mr. Noon's affidavit.

Mr. Works: That is fine. Thank you.

The Court: The time to file any response by the Long Beach Association, or the Mallonee Shareholders Committee and by the San Francisco Bank to their document designated response, if any is desired to be filed, will expire 12:00 [270] noon tomorrow.

Mr. Bishop: You mean as to Long Beach?

The Court: As to yours too. You will get until 12:00 o'clock noon tomorrow to file anything you want in response or in opposition to the response of the Long Beach and Mallonee response, and they have until 12:00 o'clock noon to file any affidavits

they desire in opposition to the affidavits of Bogardus and Noon. And the petitioners who will have to communicate with all of these people will have until 5:00 o'clock Wednesday, that is, O'Melveny & Myers and FitzPatrick.

Mr. Gilbert: Your Honor, I think the things sought have to do with letters of protest written to the San Francisco Bank protesting the doing of business with the San Francisco Bank after the Los Angeles seizure. I wonder if it might be easier for the San Francisco Bank, having those all together, perhaps Mr. Angell would phone up there and ask that they be sent down so that we might have those protests in court. That would be the best evidence.

Mr. Angell: We will produce anything that we can, and we will be glad to telephone and find out, if you will tell us just exactly what you want.

The Court: What difference does a protest make?

Mr. Gilbert: They are setting up here—I may be wrong—that by reason of doing business with them we have no [271] complaints to make.

The Court: The theory of estoppel?

Mr. Gilbert: Yes.

The Court: Can you find that out by tomorrow morning?

Mr. Angell: We will be pleased to, your Honor, if they will tell us just what they want.

The Court: They want all protests against the seizure and dissolution of the Los Angeles Bank, the transfer of the assets to the San Francisco Bank,

to the Portland Bank and the creation of the San Francisco Bank.

Mr. Gilbert: One other thing—and a protest and doing business under compulsion with the San Francisco Bank. That was likewise protested.

The Court: Then really what you want is the protest after the establishment of the San Francisco Bank and doing business with the San Francisco Bank?

Mr. Gilbert: That is correct.

Mr. Fussell: In the nature of a protest and reservation of rights to continue the protest notwithstanding the doing of business. I think that that perhaps is as accurate a description as we could give.

Mr. Bishop: As I understand it, Mr. Fussell——

The Court: You are now making a demand for those?

Mr. Gilbert: I do; yes.

The Court: A demand for the production of documents? [272]

Mr. Gilbert: Yes.

Mr. Works: Yes.

The Court: Who is?

Mr. Gilbert: I do, your Honor.

The Court: The First Federal of Wilmington?

Mr. Gilbert: The First Federal of Wilmington; yes, your Honor.

The Court: And the plaintiffs in Case No. 5678, now consolidated with Case No. 5421?

Mr. Works: Yes, your Honor.

The Court: And O'Melveny & Myers and Fitz-Patrick?

Mr. Works: That is correct, your Honor.

Mr. Angell: If you are demanding them you will have to demand them legally from San Francisco. That is where they are.

The Court: You are in court. The San Francisco Bank is here.

Mr. Angell: We are here, but the custodian of those records isn't here.

The Court: Your client is subject to the order of this court as long as you are here. Counsel is demanding the inspection of those documents.

Mr. Angell: He may have them, your Honor, but——

The Court: If he has not got them he cannot inspect them, but he is demanding them now and I am going to order [273] you to produce them if you have them.

Mr. Angell: If your Honor please, it is now 4:40, pretty nearly 4:45, and the San Francisco Bank is closed. We will not be able to communicate with the San Francisco Bank or with anyone in the office until it opens in the morning, which I think is 9:00 o'clock. Is that right?

Mr. Dusenbery: 9:30.

Mr. Angell: 9:30.

Mr. Gilbert: They will be here by Wednesday?

Mr. Angell: As soon as we can get in touch with Mr. Bogardus.

The Court: I did not order you to produce them tonight.

Mr. Angell: No, I just wanted to make sure we would have time to get in touch with them.

The Court: Surely.

Mr. Bishop: I wish to call the court's attention——

The Court: Let us fix the time. Let me put it this way, Mr. Angell: If you will advise us by tomorrow noon what is available then I will fix the time.

Mr. Angell: We will endeavor to do it even before that. What we want to make clear is what protest do you want.

Mr. Works: All of them, because that is a virtual representation of all of the associations.

The Court: All associations listed in the affidavit of Bogardus. [274]

Mr. Bishop: That is my point. All of them didn't do it.

The Court: Whoever did.

Mr. Angell: It is only the ones that did?

Mr. Works: Only the ones that you have.

Mr. Angell: Mr. Dusenbery tells me—I am not familiar with these records—Mr. Dusenbery calls to my attention that it may be that petitions are filed in the individual files and there will have to be a search made in each file. We will produce them as rapidly as that can be done, if that is required, but we will let you know either by noon or before what the physical situation is.

The Court: What the situation is?

Mr. Angell: Yes.

The Court: Very well.

Mr. Gilbert: May I ask if you will also ascertain with respect to what is available and demand of the San Francisco Bank with respect to the transfers or the Los Angeles Bank or the Portland Bank with respect to the transfers of the stock? I understand certain letters were written in that regard also.

Mr. Bishop: I never saw them.

Mr. Angell: If there is, I don't know anything about it.

Mr. Gilbert: Will you inquire?

The Court: You are only interested in letters either of protest or reservation of right?

Mr. Gilbert: As well as the letter, if there was one. [275]

The Court: In connection with the transfer of stock?

Mr. Gilbert: In connection with the transfer of stock.

The Court: And in connection with doing business?

Mr. Gilbert: That is right, your Honor.

The Court: I think that is simple and clear.

Now have you any more evidence?

Mr. Chapman: One more point, your Honor. Did I understand you correctly to say that File No. 5678 is not part of the record on appeal? I thought I heard you say that.

The Court: It is part of the record on appeal and it is numbered.

Mr. Chapman: 5678?

The Court: No. 5678 has page numbering in it,

but the documents as they are flowing into the files, once in a while gets into 5678 and the rest of them get into 5421, so I had Mr. Stacey provide me all of the files in 5678 Saturday and various other ones here so that I would have the advantage of reading all the documents.

Now except for the counter-affidavits, does that conclude the evidence on all sides with relation to the application of O'Melveny & Myers and Fitz-Patrick for fees?

Mr. Works: We rest, your Honor.

The Court: When these affidavits come in?

Mr. Works: Yes, subject to that.

The Court: Except for the counter-affidavits?

Mr. Angel: We rest. [276]

* * *

HUGH W. DARLING

Cross-Examination

By Mr. Chapman: [337]

* * *

Q. Assume that the future corporate existence of the [338] attorney's client might depend upon the outcome of this litigation, would that fact make any difference in your opinion of the value?

The Court: Of this litigation or this application for fees, which?

Mr. Chapman: The litigation is the first question, your Honor.

The Court: Very well.

The Witness: Yes, if I understand your ques-

(Testimony of Hugh W. Darling.)

tion, and that is a factor that I did consider because I assumed from the contents of the affidavit that Mr. Gilbert's client, as a corporate entity, might be in jeopardy. [339]

* * *

TRACY SKELTON

called as a witness by and on behalf of the petitioner Gilbert having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name? [344]

The Witness: Tracy Skelton.

Direct Examination

By Mr. Gilbert:

Q. Mr. Skelton, in 1946 were you an officer of the First Federal Savings and Loan Company?

A. I was.

Q. What position did you hold? What office did you hold at that time? A. President.

Q. Just to focus your attention to a date, do you recall the occasion of the seizure of the Los Angeles Bank? A. I do.

Q. With respect to that date, will you state whether or not some time thereafter your association was examined for purposes of ascertaining whether or not your association had appropriated a contribution for purposes of a fund to legally protest the seizure of the bank?

Mr. MacGuineas: Your Honor, I should like to inquire——

(Testimony of Tracy Skelton.)

The Court: It is complex, compound and confusing.

Mr. Gilbert: I withdraw it.

Q. Sometime approximately in June of 1946 did examiners present themselves at your institution to examine the records? A. Yes.

Q. And do you recall who it was?

A. I do not. [345]

Q. They identified themselves to you at the time, did they? A. They did.

Q. As what?

A. Examiners making a spot check.

Q. Did they state to you what they were spot checking for? A. They did not.

Q. Did they examine any of your books?

A. Yes.

Q. What did they examine?

A. Particularly the minute book and the expense account.

Q. Did they ask you any questions in connection with it? A. None to speak of.

The Court: Did you ask them any?

The Witness: I was given to understand——

Mr. Angell: Just a minute, your Honor. This man says he didn't even know the names of who was there. If we are to be bound by any such testimony we would like the time, place, who was present, what was said. We object to it.

The Court: Did you ask them any questions?

The Witness: I asked them what they were there for.

(Testimony of Tracy Skelton.)

The Court: You asked them questions? [346]

The Witness: Yes.

The Court: Did they give you an answer?

The Witness: No.

The Court: Who was present when you asked them this question?

The Witness: The secretary of the association, Mr. Bertram, was there.

The Court: Mr. Bertram?

The Witness: Yes.

The Court: What did they say?

The Witness: Well, they were very evasive.

The Court: That may be stricken as a conclusion.

What did they say? The idea is trying to rebuild a picture of what happened.

The Witness: We couldn't find out what they were there for.

The Court: Did they say anything?

The Witness: Very little. They wanted to look at our minute book and our expense account.

The Court: When you asked them what they were there for, didn't they say anything?

The Witness: They said they wouldn't tell us what they were there for.

Mr. Angell: I think that answers the question. [347]

Q. (By Mr. Gilbert): Did you receive a bill for that examination? A. We did not.

Q. Did you have another conversation on December 10th of last year with some examiners?

A. Yes.

(Testimony of Tracy Skelton.)

Q. Who were they?

A. A man by the name of Turner was the chief examiner, and I have forgotten the junior examiner's name.

Q. Where did this conversation take place?

A. Over a cup of coffee in a cafe.

Q. Who, if anyone, was present besides yourself and the other gentlemen?

A. Mr. Bertram was with us.

Q. Did you have a conversation with them respecting any charges or what you were doing in connection with attorney fees? Just answer that yes or no. A. Yes.

Q. Will you relate what was said at that time?

A. Mr. Turner, after several minutes over a cup of coffee, said, "We have been trying to get up nerve enough to ask you a question all week." This was on Friday, after they came in on Monday.

And I said, "Well, for God's sake, if you got a question to ask, ask it and if it is right I will answer it; if it [348] isn't, I won't."

And he turned to the junior examiner and he said, "You ask him."

The junior examiner said, "No, you ask him. You are the chief examiner."

So he said, "We have gone through your expense accounts and we don't find any charges for attorney fees."

I said, "That is right."

"Well, you have an attorney, don't you?"

I said, "That is right."

(Testimony of Tracy Skelton.)

"You expect to pay him, don't you?"

I said, "No."

He said, "How is he going to be paid?"

I said, "He will apply to the court for his fees and that is the agreement we have with him."

Q. Was there anything said in that conversation about whether or not they had been sent down there to ascertain that fact? A. No, sir.

Mr. Gilbert: Cross-examine.

Cross-Examination

By Mr. MacQuineas:

Q. Mr. Skelton, I take it that you have had conversations with a good many examiners of the Home Loan Bank Board during the time that you have been an officer of the Wilmington [349] Federal, is that correct? A. That is correct.

Q. And has it not been the general practice of such examiners to inquire of you whether or not you had, at the time of their examination, any outstanding liabilities, contingent or otherwise?

A. That is right.

Mr. MacQuineas: That is all.

The Court: Did any of them ever take you to a cafe for a cup of coffee and ask about attorney fees before?

The Witness: No, they never did.

Q. (By Mr. MacGuineas): Did you take them or did they take you?

A. I think I paid most of the bills.

Mr. Gilbert: That is all.

(Witness excused.)

Mr. Gilbert: Your Honor, Mr. Belcher is back now.

The Court: Very well.

FRANK B. BELCHER

resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Chapman:

Q. Mr. Belcher, you have read the report of the investigating committee previously referred to?

A. Hurriedly. [350]

Q. Would the matters therein referred to in any way affect your estimate of the value of attorneys' fees?

A. No, I don't believe so because I had assumed from the matters which were set up in the petition and in Mr. Gilbert's affidavit that this was a very novel type of litigation. That was quite apparent. And I had that in consideration and in mind when I expressed the opinion which I did a while ago, taking into consideration also the fact which I want to lay some emphasis on, that this is merely, as I understand it, an interim allowance on account of attorneys' fees.

Mr. Chapman: That is all the questions I have.

The Court: You may step down and be excused.

Mr. Westover: Pardon me, Mr. Belcher. Just one question.

(Testimony of Frank B. Belcher.)

Cross-Examination

By Mr. Westover:

Q. Mr. Belcher, I think you mentioned the fact that you had estimated these on the basis of \$50 per hour? A. Roughly that.

Q. Approximately that? A. Yes.

Q. In using that figure, was that what is commonly known as a base pay figure per hour or would that be like an overtime, time and a half or a double time figure per hour, [351] to use the terminology of unions, etc.?

A. Are you speaking generally now?

Q. I am speaking as to your use of the rate of \$50 per hour. Was that a base pay rate?

A. Well, I think that that is popularly regarded as a base pay rate of counsel of standing in matters of importance.

The Court: That is, assuming that he works regular hours at his office?

The Witness: Yes, sir.

The Court: Or in court?

The Witness: Yes, your Honor.

Q. (By Mr. Westover): Then if such hours as were worked, we will say, in the middle of the night and under court order or on Saturdays or Sundays or other unusual hours, would you feel that you were justified in increasing or decreasing that rate per hour?

A. Well, taking that just as an isolated consider-

(Testimony of Frank B. Belcher.)

ation, it would involve some increase in the value that you would normally place on services.

However, in this matter, if I may make one further observation, one of the important elements in fixing attorneys' fees is lacking in this case, that is, the end result, and therefore as I view this matter you have to take it more or less on a time basis, the nature of the litigation and the forum in which it is being conducted. [352]

The Court: Well, for instance, did you take into consideration the fact that on Armistice Day, beginning at 9:00 o'clock in the morning and continuing until midnight and after on that day, counsel in this case were in consultation with the court in the drafting of an order with the clerk and the reporter present?

The Witness: I took into consideration that there was a meeting of that kind. I had not noted, however, if it was on Armistice Day.

The Court: And many Saturdays and many, many nights after hours during the time that other cases were tried in court, and we would meet in connection with orders or ex parte matters in connection with this case.

The Witness: I noted that there were a number of night meetings; yes, sir.

Mr. Westover: That is all.

The Court: By the way, Mr. Belcher, Mr. Stacey, the clerk, has brought in the files in this case. They are now on the table. In fixing your fee did you take into consideration the fact that Mr. Gilbert

(Testimony of Frank B. Belcher.)

was brought into this case in August 1949 and that the case had been pending since May 27, 1946, and that all except, I think, about two volumes of those files which number now in excess of 13,000 pages, had accumulated prior to that date, which involved approximately 100 hearings in court, and that he would have to familiarize [353] himself with what had occurred prior to the time of his association in the case?

The Witness: I noted that he had been brought into the matter approximately 24 weeks ago. I did not have in mind that the files were nearly as voluminous as those I now see.

The Court: There are how many volumes, Mr. Clerk?

The Clerk: 37.

The Witness: I had no idea that your files were that voluminous; no, sir.

The Court: The transcript is not here, neither are the exhibits.

Further questions?

Mr. Westover: No further questions.

Mr. Angell: No.

Mr. Bishop: Could I ask Mr. Belcher a question off the record?

The Court: No, on the record. You can after court is adjourned.

Very well. Step down.

(Witness excused.)

The Court: The other witness, Mr. Darling, is still reading the report.

By the way, Mr. Clerk, while you were absent Mr. Hugh W. Darling was sworn as a witness by the court and testified on direct and cross. [354]

The Clerk: Yes, your Honor.

Mr. Gilbert: Mr. Bishop.

The Court: To the witness stand?

Mr. Gilbert: Yes, your Honor.

Here comes Mr. Darling. Perhaps with your Honor's indulgence we might finish with him.

The Court: You may resume the stand.

HUGH W. DARLING

resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Chapman:

Q. Mr. Darling, have you now read the report?

A. Let me explain it. I read it hastily, I did not read all of the footnotes and some of the legal cases that were quoted. One of them, Jones vs. SEC, I am entirely familiar with, so I did not read that and I did not read the appendix.

Q. Taking into consideration that report and the matters therein disclosed, does that in any way affect your previous estimate of the valuation of services of Mr. Gilbert?

A. No, I read this report and from the information I gained from it, it only served to support my conclusion that this is an extremely complex piece of litigation.

Mr. Chapman: That is all.

(Testimony of Hugh W. Darling.)

The Court: You may be excused.

Mr. Westover: Pardon me. May I ask the same question [355] of Mr. Darling as I asked of Mr. Belcher?

The Court: Yes.

Cross-Examination

By Mr. Westover:

Q. The figure you gave of \$50 per hour, I think you stated, was that in your opinion what is commonly known as a base pay rate or did you take into account in that overtime or double time or Saturdays and Sundays?

A. Well, I think I took into consideration all of the factors that appeared to exist from the affidavit that I read and in the hypothetical question.

I might say that at least in our office we do keep time records and time is always an element that is considered. I took into consideration the earning power of an attorney, or what should be the earning power of an attorney of Mr. Gilbert's caliber, the maximum possibility that he can realize, and on that computation I used six hours a day as a maximum pay day as distinguished, I think, from Mr. Morrow who used five hours—I think perhaps he is more accurate—and I extended that for a year. I figured that the very minimum of the gross return of an attorney for overhead would be one-third, and usually it is 40 per cent and often goes to 50 per cent, so I came out with a round figure of in the

(Testimony of Hugh W. Darling.)

neighborhood of \$45,000 or \$50,000 a year, and then figuring income taxes, it was my conclusion that if an attorney who is experienced and has a reputation for ability, if he cannot gross, or we will say net before taxes, in the neighborhood of \$40,000 or \$50,000 a year I think his time is not well spent.

Now perhaps I have rambled too far and didn't answer your question.

Q. I think you have given me a lead on it.

If a great deal of those hours were over and beyond the normal 6-hour day that you have used, would you think that those hours spent late at night or Saturdays or Sundays or at other times in excess of the 6-hour day that you have considered, would justify a higher or a lower hourly rate?

A. In my evaluation of this matter for the value of the services I did take into consideration that litigation of this nature properly discharged—and I know that Mr. Gilbert would discharge it properly—necessarily would entail a great deal of what we might call overtime work.

To answer your question again, I certainly do think that in any case which does necessitate undue overtime it must be considered and that factor appraised.

Q. In other words, there are hours spent in the middle of the night, in court hearings late at night, that would take a higher rate or a lower rate?

A. I should think so.

Q. It would take a higher rate?

A. Yes. [357]

Mr. Westover: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Gilbert: Mr. Bishop.

IRVING G. BISHOP

called as a witness by and on behalf of the petitioner Gilbert, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gilbert:

Q. You are an attorney-at-law, Mr. Bishop?

A. Yes, sir.

Q. And you are representing and have represented the San Francisco Bank for some time in this litigation?

A. Yes, sir. I am one of counsel.

Q. You are one of counsel? A. Yes.

Q. One of three counsel? A. Yes.

Q. And you maintain your own office, do you?

A. Correct.

Q. The San Francisco Bank is one among other clients that you have?

A. That is correct.

Q. You have represented the San Francisco Bank in this [358] litigation now for how long approximately?

A. Well, roughly it will be four years in April.

Q. And for that period of time has the San

(Testimony of Irving G. Bishop.)

Francisco Bank compensated you for the services you have rendered to them in this litigation?

A. Yes, sir.

Q. And that has been, has it, by check of the San Francisco Bank? A. Yes, sir.

Mr. Gilbert: That is all.

The Court: Any other questions on this side of the table?

Mr. Works: Not a question, your Honor, but I would like to have the witness' testimony also tendered as a part of our application. You see, we rested a while ago except as to certain matters.

The Court: You now offer the witness as direct testimony as part of your case?

Mr. Works: I should like to reopen our case for that purpose, your Honor.

The Court: Very well.

Mr. Works: Thank you, your Honor.

The Court: Any further questions? (No response.)

Do you want to cross-examine yourself?

Mr. Bishop: Yes, I would like to ask one question. [359]

Cross-Examination

Mr. Bishop: No one asked me what the compensation was. I am quite confident that it is not on the basis of \$50 an hour or anywhere near that.

Q. (By Mr. Angell): What is it, Mr. Bishop?

A. It is seven divided into \$100 a day.

The Court: 7?

(Testimony of Irving G. Bishop.)

The Witness: A 7-hour day, for every 7 hours, \$100, or \$14 and some cents. I didn't pay that much attention to it.

Q. (By Mr. MacGuineas): Mr. Bishop, do you consider that fair and reasonable compensation for the nature of the services in this community?

Mr. Chapman: Just a moment.

Mr. Works: I will object to that as not proper cross-examination, if I may, your Honor.

The Court: No, it is not. Objection sustained.

Mr. Works: I believe there was an answer, your Honor, and I move that that be stricken.

The Court: It may be stricken.

The Witness: I didn't answer the question, but the opportunity was extended to me. I am rather tempted to qualify myself, if counsel want my opinion. I have been on derivative matters before, as your Honor is well aware of, [360] and I made an extensive search of every case that has been decided at that particular time in the state and——

Mr. Works: The objection was sustained.

The Court: He is asking himself a question now.

Mr. Works: What is the question then?

The Court: I think you had better get a question in the record.

The Witness: I was going to ask myself what my qualifications were so I was going to relate them first.

Mr. Works: We will object to that as not proper cross-examination.

The Court: It is not proper cross-examination.

(Testimony of Irving G. Bishop.)

They did not qualify you as an expert or call you as an expert.

Mr. Bishop: No, but I believe we have the opportunity, since I have been placed on the stand, to rebut that.

The Court: No. They called you as a witness and you are still under cross-examination.

Mr. MacGuineas: Can Mr. Bishop call himself as a witness?

The Court: At the appropriate time, not now.

The objections are sustained and the answers may be stricken.

Any further questions? [361]

Cross-Examination

By Mr. Chapman:

Q. Mr. Bishop, are you aware of any vote of the stockholders of either the San Francisco or the Los Angeles or the Portland Banks, or any one of the three of them, concerning use of the bank's money for attorneys' fees and expenses in this litigation? Now just answer yes or no first, please.

A. You are speaking of the shareholders?

Q. Stockholders, members, shareholders, whatever they may be.

A. You mean as distinguished from the board of directors?

Q. The stockholders or shareholders or members.

The Court: As distinguished from the board of directors?

(Testimony of Irving G. Bishop.)

Mr. Chapman: That is right.

The Witness: Not of my own knowledge; no, sir.

Q. (By Mr. Chapman): Have you any knowledge whether or not such a vote has been taken?

A. No, sir, none whatsoever.

Q. Have you any knowledge whether or not it is an admitted fact on your part as attorney for said bank in this action that such a vote has been taken?

The Court: Just a moment. I do not understand the question. [362]

Mr. Chapman: Let's take it over again.

Q. Have you not admitted in the conduct of this litigation, in your response to the order to show cause——

The Court: I have to decide what he has admitted in his response.

The Witness: I would like to——

The Court: Just a moment. There is no question pending.

The Witness: All right.

Mr. Chapman: Your Honor, I would like to ask the question of this attorney's knowledge of the litigation since he is trying to qualify himself as an expert.

The Court: No, he has not. The question is stricken.

Q. (By Mr. Chapman): Have you advised the stockholders by any communication to them concerning this litigation, not what was in it but just have you or haven't you advised them?

(Testimony of Irving G. Bishop.)

A. Well, not waiving any privilege and——

Mr. Angell: That is objected to as incompetent, irrelevant and immaterial. It is privileged what he advised his client.

Mr. Chapman: I didn't ask that, I just asked if he had.

The Court: It is not proper cross-examination. The objection is sustained.

Q. (By Mr. Chapman): Are you aware that the stockholders of your bank [363] have protested the payment of attorneys' fees and expenses from the assets——

The Court: That assumes a fact not in evidence. Let us get on.

Mr. Chapman: I would like to urge the question, your Honor.

The Court: There is no evidence as to that. I am not trying anybody's case for them, but after all it takes me less time to see it and say it than it does for a lawyer to say it or for me to argue it.

Q. (By Mr. Chapman): Have any of those payments been made since the 7th of July, 1948, Mr. Bishop?

The Court: Just a moment. Have what?

Mr. Chapman: Have any of the payments to you since the 7th of July, 1948?

The Court: What payments?

Mr. Chapman: I understood a figure was given as to what he was paid and at a certain rate.

The Court: Do you mean has he received any money since that date as fees?

(Testimony of Irving G. Bishop.)

Mr. Chapman: That is right.

The Court: Very well.

The Witness: Yes, sir.

Mr. Chapman: That is all. [364]

The Court: Any further cross-examination? (No response.)

Any redirect?

Mr. Gilbert: No further direct, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Gilbert: Your Honor, at this time I will request that I may be given a stipulation with respect to Mr. Angell and Mr. Dusenbery, except as to the period of time involved—their appearance as attorneys of record would appear in the record—that their testimony would otherwise be the same with respect to payment for fees.

Mr. Works: Not as to the rate, you merely want to establish the fact.

Mr. Gilbert: Just as to the fact.

The Court: Not as to what?

Mr. Gilbert: Not as to the rate or amount of their pay, but merely as to the fact that they have been paid by the San Francisco Bank.

Mr. Angell: If I enter into a stipulation I will enter into the rate as well as the fact that I have been paid, and if you don't want to you can put me on the stand and I will testify to the same thing, because the fact is that Mr. Dusenbery and Mr. Bishop and myself all have the same rate.

Mr. Gilbert: Would you please take the [365] stand.

PHILIP H. ANGELL

called as a witness by and on behalf of the petitioner Gilbert, having been first duly sworn, was examined and testified as follows:

Mr. Gilbert: Perhaps I misunderstood you. Mr. Works has called to my attention that you would stipulate that your testimony would be the same with respect to your rate and the fact that you had been paid the rate, as the same for all three.

The Witness: Yes, Mr. Gilbert.

Mr. Gilbert: That is all. I misunderstood what you said.

(Witness excused.)

Mr. Gilbert: And Mr. Dusenbery, is that likewise the same with you?

Mr. Dusenbery: Yes, that is correct.

Mr. Works: May those stipulations be deemed to be in our record also, your Honor?

The Court: Very well.

Mr. Gilbert: Your Honor, as part of my motion I would like to——

The Court: Pardon me. I would like to ask Mr. Bishop, Mr. Angell and Mr. Dusenbery a question, and perhaps it may not be necessary if I tell them what is in my mind.

If during the period that they, and each of them, have [366] represented the San Francisco Bank, or

whatever unit they have represented in connection with this litigation, they have at any time represented any building and loan association whether in the Federal system or out of the Federal system.

Mr. Bishop: I have no hesitancy in answering. I have represented none.

The Court: Will you accept Mr. Bishop's statement?

Mr. Works: Yes.

Mr. Gilbert: Certainly.

Mr. Bishop: I have been interested in other litigation for the bank involving other associations.

The Court: I mean appearing for an individual association.

Mr. Bishop: No, sir.

The Court: Mr. Angell?

Mr. Angell: I have appeared for none before.

The Court: Or represented them?

Mr. Angell: Or represented them.

The Court: In any capacity?

Mr. Angell: In no capacity.

The Court: Do you accept Mr. Angell's stipulation?

Mr. Works: Yes.

Mr. Gilbert: Yes.

The Court: Mr. Dusenbery? [367]

Mr. Dusenbery: I have not represented any association, your Honor, since I have been counsel for the Bank.

The Court: Very well.

I think that I would like to ask one other thing. Perhaps I can state it in the form of a stipulation.

It has almost become a matter of common knowledge.

Mr. Bishop is engaged in the business of private practice in law in Los Angeles, maintaining offices as Bishop & Hoffman in the Chester Williams Building and engaged in the general practice of law.

Is that correct, Mr. Bishop?

Mr. Bishop: That is correct.

The Court: And Mr. Angell is engaged in the general practice of law in San Francisco, and the name of the firm is?

Mr. Angell: Athern, Chandler & Farmer, Hoffman & Angell.

The Court: And your offices are in what building?

Mr. Angell: 593 Market Street.

The Court: And you are engaged in the general practice of law?

Mr. Angell: For 28 years.

The Court: And Mr. Dusenbery is engaged in the general practice of law?

Mr. Dusenbery: I am engaged in the general practice in [368] Portland. The name of the firm is Dusenbery, Martin & Schwab.

The Court: Very well.

Mr. Gilbert: May I now incorporate a reference, your Honor, to the order made and proceedings heard on November 7, 1947, with respect to the consolidation of Case No. 5421 and Case No. 5678, appearing first on page 510 of that transcript, particularly line 20 thereof.

The Court: Is there not a written order?

Mr. Gilbert: Apparently not, your Honor.

The Court: Very well.

Mr. Gilbert: On line 20 of page 510, the court speaking, stated:

“But the transfer was made, and I think now I ought to dispose of it, and I will by at this time making an order of consolidation of Case No. 5678 with Case No. 5421.”

And concluding on page 514 of that same transcript, on line 7, the court stated:

“It is consolidated for all purposes.”

Your Honor, there has been a suggestion—I have just some more references to make in evidence—there has been a suggestion that I suggest to your Honor we might recess now until tomorrow morning.

The Court: That is agreeable with me. I think the [369] witnesses that you were feeling you would discommode have been disposed of.

Mr. Gilbert: That is true.

The Court: Very well. We will recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 7:00 o'clock p. m., an adjournment was taken until 10:00 o'clock a.m., Tuesday, February 28, 1950.) [370]

PHILIP H. ANGELL

recalled as a witness, resumed the stand and testified further as follows:

Direct Examination

By Mr. Gilbert:

Q. Mr. Angell, immediately following adjournment [433] yesterday you immediately informed me, and I think one or two others, that you and Mr. Bishop and——

The Court: Were you sworn in this proceeding?

The Witness: I was sworn yesterday, your Honor.

Mr. Gilbert: Yes, your Honor. You were sworn and then I withdrew the question.

The Witness: That is right.

Q. (By Mr. Gilbert): ——that you and Mr. Bishop and Mr. Dusenbery would like to make an amendment with respect to the amounts that you referred to yesterday.

A. I think it is an addition rather than an amendment. We stated yesterday, your Honor, each of us, that our rate under our agreement with the San Francisco Bank was \$100 a day for a 7-hour day.

The Court: That is, if you do not work 7 hours you do not get \$100?

The Witness: That is correct. We get a pro rata of what number of hours we work. But that is not the purpose. I want to give the whole statement to the court.

(Testimony of Philip H. Angell.)

Prior to January of this year, I believe it was, the agreement read that we were to receive \$100 a day for office work and/or such proportionate basis if less than a day of 7 hours, and \$150 a day for court appearances.

The Court: Each of you? [434]

The Witness: Each of us.

And we neglected to state that to the court yesterday, for the reason that Mr. Dusenbery, I believe, only made one charge of a court appearance, Mr. Bishop has made a few—I don't know how many, he isn't here——

The Court: That is, you get \$150 for a court appearance regardless of how long it is?

The Witness: Yes. And I have made no charge for court appearances.

Now in January of this year——

The Court: That is, since January 1st?

The Witness: At all since being attorney in the case.

The Court: I see.

The Witness: And I construed that to mean trial court appearances and not on preliminary motions.

The Court: In other words, your rate has been the same for court work as office work?

The Witness: No. Well, such work as I have done in court I have charged \$100 a day for.

The Court: For instance, 7/100 of whatever it is?

The Witness: No.

(Testimony of Philip H. Angell.)

The Court: You charge a flat \$100?

The Witness: For each day in court, because we are out of our city where our offices are and it consumes the day.

The Court: I see. [435]

The Witness: And in January of this year the agreement, I see as it came through—and it is just a letter notification—the agreement actually changed the employment compensation to be \$100 a day for work not in trial and \$150 a day for trial appearances.

The Court: Is this a trial?

The Witness: These are not construed to be trials.

The Court: Very well. So that yesterday the total chargeable fee against the Bank was 3 times \$100?

The Witness: That is correct.

The Court: Or \$300?

The Witness: That is correct.

Q. (By Mr. Gilbert): Or if this were construed as trial time it would be \$450?

A. That is correct.

Mr. Gilbert: That is all.

The Court: Any other questions?

Mr. Works: May I ask one, your Honor?

The Court: Surely.

Cross-Examination

By Mr. Works:

Q. Is it fair to say, Mr. Angell, that under this

(Testimony of Philip H. Angell.)

arrangement you men are being scandalously underpaid?

A. I accepted it, Mr. Works, and I am not criticizing [436] the compensation.

I might add that if I were being employed privately I would not accept employment on that basis. I think it is generally understood and known that any attorneys who accept employment from public bodies, either in Federal or state matters, receive less compensation than do attorneys in private practice for private clients.

Q. Well, now, would you care to answer my question, please?

A. Will you state the question, please?

Q. Whether or not you gentlemen are each being scandalously underpaid.

A. I would not state that, because if I stated that I should withdraw as counsel in the case. I accepted it, as each counsel did for the Bank, knowing what our compensation was going to be. Therefore it was satisfactory to us.

The Court: Do you render monthly statements and are paid——

The Witness: We are paid monthly.

The Court: You render your statements and are paid and have been paid?

The Witness: That is correct.

The Court: So there is no contingency about your compensation?

The Witness: No contingency whatsoever. [437]

Mr. Works: That is all.

(Testimony of Philip H. Angell.)

Mr. Chapman: Just a moment.

Cross-Examination

By Mr. Chapman:

Q. Mr. Angell, are you being asked to remit or refund two-thirds or any part of your fees in furtherance of your clients' interests?

A. We are not being asked to remit anything, Mr. Chapman.

Q. Or to forego any part of them?

A. No.

Q. Or to await the outcome of appeals and writs and litigation before you receive your money?

A. No. We send our bills in monthly and they are paid. When we get the money it is ours.

Mr. Chapman: That is all.

Mr. Westover: Just one question.

Cross-Examination

By Mr. Westover:

Q. Have you been paid since——

The Court: Have you been paid up to date?

The Witness: As far as I know we have been paid right up through January.

Q. (By Mr. Westover): Right up to [438] date? A. That is correct.

The Court: Up through January, he said.

Q. (By Mr. Westover): Have you received any compensation since July 6, 1948?

(Testimony of Philip H. Angell.)

A. Oh, yes. We received our regular compensation, the bills we have rendered.

Q. Regularly since that date?

A. I would say regularly; every month.

Mr. Westover: Thank you. That is all.

The Court: You may be excused.

(Witness excused.)

Mr. Gilbert: Mr. Skelton, please.

The Clerk: Were you sworn yesterday?

The Witness: Yes.

The Clerk: Be seated.

TRACY SKELTON

recalled as a witness, resumed the stand and testified further as follows:

Direct Examination

By Mr. Gilbert:

Q. You were sworn yesterday, Mr. Skelton?

A. Yes.

Q. I hand you, which I have shown to counsel for the defendants, what purports to be the resolution of May 16, [439] 1946, of the First Federal Savings and Loan Association of Wilmington. Is that the minutes?

A. Those are the minutes; yes, sir.

Q. And signed by you as president?

A. That is right.

Q. Now with particular reference to the form of a letter sent out on one of those pages, was that let-

(Testimony of Tracy Skelton.)

ter, of which the resolution or the minutes, rather, contain a form, was that actually sent out to the Bank? A. Yes, sir.

Q. And to Washington? A. Yes, it was.

Mr. Gilbert: May that be read into the record, gentlemen?

Mr. MacGuineas: Yes.

The Court: The resolution?

Mr. Gilbert: No, just the letter. It was sent to everybody. The date of the minutes was May 16, 1946.

The Court: Very well. Read it.

Mr. Gilbert: It is addressed to the Federal Home Loan Bank Administration, Washington, D. C., and to the Federal Home Loan Bank, 215 West Fifth Street, Los Angeles, California—

Mr. Dusenbery: We are willing to waive the reading of the document. It is quite long. [440]

Mr. Gilbert: I am only going to read the letter.

Mr. Dusenbery: We are willing to deem it read and have it copied into the record.

Mr. Gilbert: That is satisfactory.

The Court: Let me see it.

(The document referred to was passed to the court.)

The Court: You may read it.

Mr. Gilbert: Yes, your Honor.

“Gentlemen:

“The undersigned association which is or at least until March 29, 1946, was a member and stock-

(Testimony of Tracy Skelton.)

holder of the Federal Home Loan Bank of Los Angeles, respectfully protests Orders Nos. 5082, 5083 and 5084 of the Federal Home Loan Bank Administration, dated March 29, 1946, and all purported action thereunder, and hereby reserves the right to question the validity and propriety of each and all of such orders and of any and all action purportedly authorized thereby.

“If this association is to avail itself of its rights as a member of the Federal Home Loan Bank System, it may be necessary for it from time to time to deal with or transact business with the Federal Home Loan Bank of San Francisco, purportedly established by such orders. This is to advise [441] you that no such dealing or transaction is intended to be or is to be taken as an acceptance, admission or recognition by the undersigned association of the validity or propriety of the orders that we have mentioned, or of any action purportedly authorized thereunder, but that the undersigned association notwithstanding any such dealing or transaction reserves its full right to question the validity and propriety of each and all of such orders and to any and all actions purportedly authorized thereby.

“Very truly yours”

And it is signed.

The Court: Signed by whom?

Mr. Gilbert: I will ask the question.

Q. I believe you stated you signed the letter, did you, Mr. Skelton? A. That is right.

(Testimony of Tracy Skelton.)

Q. The Association by yourself as president?

A. That is right.

The Court: What association? If you are going to read it, read it into the record and read his signature.

Mr. Gilbert: The First Federal Savings and Loan Association of Wilmington, by Tracy Skelton, President.

The Court: Very well. And it was dated [442] May 15?

Mr. Gilbert: May 16, your Honor.

The Court: Very well.

Q. (By Mr. Gilbert): Did you likewise, on or about April 5, 1948, receive a letter from the Federal Home Loan Bank of San Francisco with respect to sending a check for additional shares in their stock? A. Yes, sir.

Q. And that was the letter you have before you?

A. Yes, sir.

Q. And on April 14th did you, as president, reply thereto? A. I did.

Q. This is the letter, a copy of the letter, you sent back? A. That is right.

Mr. Gilbert: On the letterhead of the Federal Home Loan Bank of San Francisco, dated April 5, 1948, addressed to John P. Bertram, Secretary, First Federal Savings and Loan Association of Wilmington, 654 Avalon Boulevard, Wilmington, California.

"Dear Mr. Bertram:

(Testimony of Tracy Skelton.)

“The analysis of your annual report of December 31, 1947, shows the following——”

I will omit the analysis. [443]

The Court: Read it all as long as you are reading it.

Mr. Gilbert: Very well.

“Net home mortgages, \$811,231, minimum FHLB stock required, \$9200, amount of stock now held, \$8400, additional required, \$800.

“In order to bring our records to date, will you kindly send us your check for \$800 to cover eight additional shares of bank stock.

“Very truly yours,

“GERRIT VANDER ENDE,
President”

The letter of April 14, 1948, in reply:

“Mr. Gerrit Vander Ende, President

“Federal Home Loan Bank of San Francisco

“821 Market Street

“San Francisco 3, California

“Dear Mr. Vander Ende:

“Enclosed find our check No. 10347 in the amount of \$800 for the purchase of eight additional shares of stock. In making this additional purchase it is to be understood that it is not our intent or acceptance or admission or recognition of the legal status of the Federal Home Loan Bank of San Francisco, and that we reserve our full right to question the validity and propriety of all actions of the officers and directors of the Federal Home Loan Bank of

(Testimony of Tracy Skelton.)

San Francisco and those [444] of the Federal Home Loan Bank Administration as they pertain to said bank.

“You may forward to us the said shares at your convenience.

“Very truly yours.

“TRACY SKELTON,
President”

That is all of this witness, your Honor.

The Court: Cross-examine.

Mr. MacGuineas: No questions.

The Court: Mr. Chapman?

Mr. Chapman: None.

The Court: You may be excused.

(Witness excused.)

Mr. Gilbert: Mr. Bertram.

JOHN BERTRAM

called as a witness by and on behalf of the petitioner Gilbert, having been first duly sworn, was examined and testified as follows.

The Clerk: What is your name?

The Witness: John Bertram; B-e-r-t-r-a-m.

Direct Examination

By Mr. Gilbert:

Q. Mr. Bertram, in 1946 were you the secretary of the First Federal of Wilmington?

A. I was. [445]

(Testimony of John Bertram.)

Q. Were you present some time around in June or July at the so-called spot check examination to which we referred yesterday?

A. Yes, I was in the office.

Q. Do you recall the name of the examiner?

A. Mr. Laippley, I believe.

Mr. Fitting: If the court please, I believe that is spelled L-a-i-p-p-l-e-y.

Q. (By Mr. Gilbert): You are still connected with the First Federal? A. Yes, sir.

Q. Approximately a week or 10 days ago, or some such matter, did you have a conversation with Mr. Noon at the bank here in Los Angeles with respect to attorneys' fees? A. Yes, I did.

Q. Do you recall when that was?

A. Friday, February 17th.

Q. And where did that conversation occur?

A. In Mr. Noon's office in the bank.

Q. In the Chester Williams Building?

A. Yes.

Q. Who was present at the conversation?

A. Mr. Noon and Mr. William Purmort.

Q. And yourself? A. Right. [446]

Q. Now will you relate what was said by Mr. Noon and yourself with respect to the matter of attorneys' fees?

A. Mr. Noon asked me what we were paying Gilbert. My reply was that we were not paying him anything, that he was looking to the court for his fees, representing the First Federal Savings of Wilmington, a Class C association.

(Testimony of John Bertram.)

Q. Did he say anything to you with respect to whether or not that was or would be a supervisory matter?

A. Yes. It was his supervisory capacity to determine whether we had any contingent liability in employing Mr. Gilbert as our attorney.

Q. And after did he say anything to you with respect to talking to you in different capacities?

A. Yes. At the close of our conversation he said, "Well, that is all in my capacity as a supervisory agent, but tell me just personally how does Mr. Gilbert expect to get paid?"

The Court: What did you say?

Q. (By Mr. Gilbert): Did you give him substantially the same answer?

A. Yes, that it was up to the court to determine.

Mr. Gilbert: That is all.

The Court: Cross-examine.

Mr. MacGuineas: No questions.

Mr. Angell: I have one question. [447]

The Court: Very well.

That was the first time he had mentioned to you that he was talking to you as a supervisory agent, was it?

The Witness: Yes. He said, "I have been talking to you as a supervisory agent."

The Court: That was the first time he had mentioned it in that conversation?

The Witness: No, he had mentioned that it was in his supervisory capacity to determine what our liability was.

(Testimony of John Bertram.)

The Court: I mean when he first opened the conversation and asked you the question prior to his asking you the question, had he told you that he was talking to you then as supervisory agent or as branch manager of the Bank, which?

The Witness: No, he hadn't stated that.

The Court: It was after you answered the question that he told you that it was part of his supervisory capacity?

The Witness: That is right.

The Court: Do you see Mr. Noon frequently?

The Witness: Not very.

The Court: Or have you in the course of your business?

The Witness: Not too frequently. I was seeing him on other business.

The Court: Well, in the course of your business do you see him occasionally?

The Witness: Yes, occasionally. [448]

The Court: About how often have you in the past year, let us say?

The Witness: Perhaps three or four times.

The Court: Did he ever say to you at any of those times that he was talking to you as a supervisory agent?

The Witness: I don't believe so.

The Court: Very well.

(Testimony of John Bertram.)

Cross-Examination

By Mr. Angell:

Q. Did he ever indicate to you in what capacity he was talking to you?

A. During this particular conversation?

Q. No, in other conversations with him.

A. Not that I recall.

The Court: You knew him to be the manager of the branch bank?

The Witness: Certainly.

Q. (By Mr. Angell): And you also know he is the supervisory agent for the Federal Home Loan Bank of San Francisco, do you not?

Mr. Chapman: Just a moment. I would like that fixed as to the question of time, your Honor, as to when that was.

The Court: Sustained.

Mr. Angell: I think if you will reread the question it fixes the time. [449]

I will withdraw the question because my co-counsel informs me that they are not acting supervisors for the San Francisco Bank but for the Bank Board. I will reframe the question.

Q. You know, do you not, that Mr. Noon is the acting supervisory agent for the Federal Home Loan Bank Board?

Mr. Chapman: Same objection.

The Court: You mean at the moment?

Mr. Angell: I said "is."

The Court: Objection overruled.

(Testimony of John Bertram.)

Mr. Chapman: May I have the question read back, Mr. Reporter?

(The question referred to was read by the reporter as follows:

(“Q. You know, do you not, that Mr. Noon is the acting supervisory agent for the Federal Home Loan Bank Board?”)

Mr. Chapman: Your Honor’s ruling indicates “is” as of today?

The Court: “Is” means now.

Mr. Angell: Present.

The Witness: Yes, we were advised by letter that he was appointed as acting supervisory agent of this district.

The Court: When?

The Witness: I don’t recall the date. [450]

The Court: Recently?

The Witness: A number of months ago.

The Court: Before you received that letter, had you done business with Mr. Noon in connection with your conduct of your affairs of the association?

The Witness: Oh, yes.

Q. (By Mr. Angell): Now in connection with your annual audits of the Federal Savings and Loan Associations—first let me ask you —there are annual audits, are there not, of the associations or approximately an audit each year?

A. An audit is conducted in conjunction with the examination.

(Testimony of John Bertram.)

Q. An audit and examination?

A. That is right.

Q. Now have you in the past dealt with Mr. Noon as supervisory agent of the Home Loan Bank Board?

A. Not before the last examination that we had.

Q. About when was that?

A. January 20 of 1950—pardon me—December 20, 1949.

The Court: By the way, how can you tell when you are dealing with Mr. Noon as a supervisory agent and as the branch manager? Can you tell the difference?

The Witness: I haven't been able to. [451]

Q. (By Mr. Angell): Has it been the common practice that after these examinations and audits that so far as known to you, that frequently you are asked to discuss the results of those examinations with the supervisory agent?

A. No, we have never been asked to.

Q. You never have? A. No.

Q. So far as known to you?

A. That is right.

Q. Now in these examinations and on your books you are required, are you not, under the form of your bookkeeping, to show any contingent liabilities of the association?

Mr. Chapman: Just a moment, your Honor. That is not proper cross-examination of a discussion or conversation with someone. I object to it on that ground.

(Testimony of John Bertram.)

The Court: Objection sustained.

Q. (By Mr. Angell): Are you required, under the bookkeeping system of the Home Loan Bank Board, to make report to them of all your liabilities?

Mr. Chapman: Just a moment. Same objection. That is not proper cross-examination.

The Court: Same ruling. The question is not what he is required to do. All he can testify to is what he knows. The [452] law speaks for itself as to what he might be required to do.

Mr. Angell: I will withdraw the question.

Q. Do you know the form of the reports you are supposed to make to the Home Loan Bank Board?

Mr. Chapman: I make the same objection, your Honor.

Q. (By Mr. Angell): With regard to your assets and liabilities each year.

Mr. Chapman: That is not proper cross-examination of the conversation with Mr. Noon.

The Court: Objection overruled. Answer yes or no. Do you know the form?

The Witness: Yes.

Q. (By Mr. Angell): And as a part of that form, Mr. Bertram, is it true or not true that you are required to show in your liabilities any contingent liabilities?

A. Yes, that is part of the form.

Q. And if there were any auditor's fees or engineer's fees or appraiser's fees or attorney's fees,

(Testimony of John Bertram.)

or any other kind of fees which you are paying on a contingent basis, you would be required, would you not, to show that in this return?

Mr. Chapman: Your Honor, I think the court has already ruled on that.

The Court: That calls for a conclusion. Objection [453] sustained.

I see it is time to recess. I am going to have to leave. I think we can resume at 2:30 today.

Before doing so, I would like to make an observation in connection with the application of the O'Melveny & Myers application.

In reading it, I notice that there is a statement made that the committee is a committee formed of the shareholders and members, or whatever you call them, of the Los Angeles Bank, and it also states that they were a committee of the California Savings & Loan League. I will expect counsel to demonstrate whether or not they are appearing in this action as a committee of the shareholders or as a committee of the California Savings & Loan League.

I mention that in order that counsel may know what is in my mind with relation to it, because I do not know that I would have the power here now, and will not determine it until I hear further argument, to allow a fee or the committee of the shareholders. But it would seem to me that there might be a greater question as to whether or not I would have the power to allow a fee or a committee of an association, the California Savings & Loan League.

(Testimony of John Bertram.)

Mr. Works: Your Honor, there was a resolution adopted by the board of directors of the Los Angeles Bank. In the other application for moneys advanced by this committee, it [454] changed its name as time went on for the benefit of the bank. Now that question is present as to that application for refund of expenses.

As far as the fee application is concerned, there is no question but what the attorneys, Mr. Fitz-Patrick and ourselves, were employed by resolution duly entered into by the board of directors of the bank.

The Court: And the class action? You also refer to the fact that you filed an application with the Corporation Commissioner of the State of California and received a permit. I have not seen it. It may be in these voluminous files someplace. I have not seen either a copy of the permit nor a reference to its number.

Mr. Works: We can produce that, if your Honor please.

The Court: Very well. We will recess until 2:30, if we may, gentlemen.

(Whereupon, at 11:30 o'clock a.m., a recess was taken until 2:30 o'clock p.m. of the same date.) [455]

Los Angeles, California; February 28, 1950;

2:30 o'Clock P.M.

The Court: Any ex parte matters?

The Clerk: No, your Honor.

The Court: Mr. Gilbert, you had a witness on the stand, I believe.

JOHN BERTRAM

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Gilbert: Mr. Angell says he is finished unless some other counsel have questions.

The Court: Any other questions? (No response.)

The Court: Very well.

(Witness excused.)

Mr. Gilbert: Your Honor, at this time I would like to offer an additional copy, because it is separated from an affidavit, of the Congressional Hearing, report of the Congressional Hearing.

Mr. Angell: That is objected to as incompetent, irrelevant and immaterial, not within any issue before this court.

Mr. Gilbert: It has been before the court and was examined by Mr. Morrow, Mr. Darling and Mr. Belcher in connection with the questions.

The Court: The objection is overruled. It is admitted in evidence. [456]

The Clerk: Shall I mark it as an exhibit, your Honor?

The Court: Yes, mark it as an exhibit.

The Clerk: No. 9.

(The document referred to was received in evidence as Petitioner Gilbert's Exhibit No. 2-27-50-9.)

Mr. Gilbert: I also offer by reference, your Honor, copies of Orders 5082, 5083 and 5084, by reference to Exhibit No. 11-7-49, No. 11; also Order 5421 by reference, the reference being Exhibit 11-7-49, No. 7; and reference to Order 2015, I particularly offer with reference to a date, which is set forth as Footnote 11 in the preliminary injunction which was filed December 1, 1949.

The Court: I think all of those orders are set forth in footnotes.

Mr. Gilbert: Yes, they are.

The Court: So why not make reference to the footnotes rather than to previous exhibits?

Mr. Gilbert: Yes. 5082, 3 and 4 is Footnote 5.

The Court: That will be No. 10 here. And by reference to Footnote 5 of the order of this court dated when?

Mr. Gilbert: December 1, 1949.

The Court: December 1, 1949.

Mr. Gilbert: The Order 2015 is Footnote No. 11 of the same document.

The Court: That will be No. 11 here by reference to [457] Footnote No. 11 in the order of December 1, 1949.

Mr. Gilbert: We also offer by reference letter of October 26th, from Mr. Peyton Ford to which is attached a letter dated October 21 from Mr. Divers, which is Exhibit No. 17 of 11-7-49.

The Court: That will be No. 12, and the two letters are Exhibits 17 of 11-7-49.

Mr. MacGuineas: Your Honor, the official defendants object to the offer of that in evidence as not being relevant to the issue of attorneys' fees here claimed. I am referring to the letter of Mr. Ford.

Mr. Gilbert: The actual reference was to the letter of October 21st, which will support, I think, an argument with reference to the amount of work that is necessary to be done even in the opinion——

The Court: I think they are both material. The objection is overruled. They are both admitted.

(The documents offered by reference were received in evidence and marked Petitioner Gilbert's Exhibits Nos. 2-27-50-10, 2-27-50-11 and 2-27-50-12.)

Mr. Gilbert: By reference to the stipulation between counsel, which was entered into on March 22, 1949, and filed the same date, with reference to attorney fees, fees then pending, and the testimony on the same date in connection with such stipulation, together with the court's order of April 5, 1949, for an interim allowance of attorney fees, and together [458] with the testimony before the court in chambers on May 10, 1949, during which proceedings the stipulation was set aside.

The Court: In effect what you are offering is the entire proceedings in connection with the application?

Mr. Gilbert: In substance, that is correct.

The Court: Of Chapman, Westover and others for attorney fees?

Mr. Gilbert: That is true.

The Court: Culminating in the order of April 5, 1949—was that the final order?

Mr. Gilbert: The final order was dated May 10, 1949.

The Court: Culminating in the final order of May 10, 1949?

Mr. Gilbert: That is correct.

The Court: That is, the stipulation, the first order, the hearing, the evidence, the petitions——

Mr. Gilbert: Yes, your Honor.

The Court: ——the conference in chambers—I do not know whether that conference in chambers was reported or not.

Mr. Gilbert: Yes, it was.

The Court: May 10th conference was reported?

Mr. Gilbert: Yes, and so was March 22nd.

The Court: There were a number of them that were not reported, I regret. [459]

Mr. Gilbert: I am quite certain that that was, however.

Mr. Chapman: May 10th was reported, without any question.

Mr. Fitting: I have it right here.

Mr. Gilbert: And March 22nd was also reported.

The Court: The March 22nd conference in chambers?

Mr. Gilbert: Yes, and May 10th was also reported.

The Court: March 22nd was the date of the

hearing, was it not, and the taking of the testimony?

Mr. Gilbert: March 22nd was the date of the conference in which the stipulation was entered into, then there was a hearing and order on April 5th, an award and an interim allowance, and then the hearing on May 10th at which the stipulation and the two-thirds remission was made and the order thereon.

The Court: I see.

Mr. MacGuineas: Your Honor, I also object to the admission of any of those in evidence on the ground that they are immaterial to this application of fees, particularly because they all relate to transactions prior to the entry of Mr. Gilbert into this case and the legal services for which he is now claiming reimbursement.

Mr. Angell: I wish to add the objection that it is incompetent, irrelevant and immaterial, and not within any issue here before the court in the matter of the application of Mr. Gilbert's or the others for attorneys' fees or allowances of [460] expenses.

The Court: I fail to see the immediate materiality of that hearing and the things you have just referred to.

Mr. Chapman: May I be heard, your Honor?

The Court: They are a part of the proceedings in this case, there is no doubt, as are all of the other files and records and transcripts and orders which are part of the proceedings and in connection with which it would be the duty of any counsel to become familiar with. But beyond that I cannot see the materiality here.

Mr. Gilbert: There may be, in my view, some materiality with respect to the history connected with the attorneys' fees, the abandonment of appeal matters and things of that kind which occurred and are reflected in those hearings. I didn't request all of the testimony with respect to all of the hearings but just the two selected dates.

The Court: Who wants to speak first?

Mr. Works: May I say something?

The Court: Yes.

Mr. Works: As far as this current offer is concerned, the substantive evidence as to these hearings we have just been discussing, we withdraw any part of that evidence as any part of our evidence in support of our application for fees. That is not to include any recitals in our affidavits as to attendance upon the meetings—they are already in evidence — [461] but we do not join in Mr. Gilbert's offer of this particular testimony in so far as our application is concerned.

The Court: Very well.

Mr. Chapman: I would like to join in the application and in the offer in connection with our response to all of the attorney fee applications. I feel that it is most material because whatever other power your Honor has inherent to the court in the litigation, you have in addition the power of a stipulation entered into on consideration of vacation of substantial awards of fees, part of which went to myself and part to other counsel, and we consented to our financial detriment to those vacating of our fees on the stipulations and conditions of the letter

from the Attorney General of the United States, from Peyton Ford, in which it was agreed, in so far as any agreement seeks to be binding on the Government in this case—and that word “all” is all-inclusive and comprehensive—that all further attorneys’ fees would be determined by proceedings in this court, adversary proceedings, etc., if there was a settlement.

The Court: That letter is in evidence in these proceedings.

Mr. Chapman: That is correct.

The Court: That is attached to your affidavit, or somebody’s.

Mr. Chapman: I am not so sure that it is in evidence. [462] It is filed as part of the files.

The Court: I think that was attached to somebody’s affidavit—no, it was not, it was referred to. I asked for it yesterday to read it.

Mr. Gilbert: It was referred to but not attached.

The Court: Is that the letter of October 26th?

Mr. Gilbert: No, your Honor.

Mr. Chapman: That is right. The letter of April 27th.

Mr. Gilbert: April 27th is the date.

The Court: That letter has not been offered in evidence yet?

Mr. Gilbert: Not yet; no.

The Court: Do you offer it?

Mr. Gilbert: Yes, I do.

The Court: Very well. That letter of April 27th is offered, to which everybody objects on all

of the grounds heretofore stated and any that they may have forgotten to mention.

Mr. Works: I might save some time if we all consider that your Honor can take judicial notice of everything in this file.

The Court: That is correct.

Mr. MacBusiness: Then may I inquire why your Honor is entering offers in evidence at this hearing of what is already in the case? [433]

The Court: I can take judicial notice of them. There have been some particular affidavits which have been in other matters which caused thought were of particular materiality to this hearing here, and I have entertained them, or if there is some particular materiality that relates to the issue as to the fees earned and the power of the court to allow them. I can see the materiality of the letter from Mr. Ford of April 17, 1948, with particular relation to the application made, not only by the O'Melveny & Myers application, but also by the Gilbert application, and with particular relation to the objections raised to the allowance of any fee on the basis that each of these concerns are private concerns, and in one of the affidavits I saw this morning it said that Mr. Gilbert's firm had so many mortgages and so much assets and property, so I think that that letter of April 17th is material, and I will admit it and it may be deemed to be read in the record and may be copied in the record at this point as Putnam's Exhibit 2-17-50-13.

(The document referred to was received in evidence as Petitioner Gilbert's Exhibit No. 2-27-50-13.)

(The exhibit referred to is, in words and figures, as follows, to wit:.) [464]

PETITIONERS' EXHIBIT No. 2-27-50-13

Address Reply to
United States Attorney
And Refer to
Initials and Number
PF:HEM

United States Department of Justice
United States Attorney
Southern District of California
600 Federal Building
Los Angeles 12

April 27, 1949

Messrs. Westover & Smith,
Attorneys at Law,
Suite 1007,
1015 Pacific Southwest Bldg.,
216 West 6th Street,
Los Angeles 14, Calif.

Re: Paul Mallonee et al. vs. John H. Fahey,
et al.

No. 5421-PH Civil and Consolidated Case

No. 5678-PH Civil.

Gentlemen:

At our conference in the office of the United States Attorney yesterday, April 26th, you requested

that, prior to further consideration of our proposal for settlement, I submit to you a final offer in writing stating the terms in respect to attorneys' fees, on which negotiations may proceed. After consultation with the Home Loan Bank Board, I am authorized to state that the Board is prepared in respect to matters of attorneys' fees, in addition to the proposal heretofore [465] made, to negotiate on any one of the following bases:

(1) The attorneys' fees, whether interim or final, shall be judicially determined in an adversary proceeding and the stipulation dated March 22, 1949, and the subsequent award of April 1, 1949, be vacated, or

(2) Following the suggestion of the court, one-third of the amount awarded by the court in its decision of April 1st shall be paid now on proper order of the court (less the deduction of \$50,000 previously paid, as provided in presently proposed order), regardless of the outcome of negotiations for settlement; the said stipulation and award shall be vacated and any further attorneys' fees shall be judicially determined in an adversary proceeding at the conclusion of negotiations for settlement, if agreement thereon be reached, or in the litigation, if such there be, or

(3) Following the suggestion of Mr. Fussell, one-third of the amount awarded by the court in its decision of April 1, 1949, to be paid now as an interim allowance on account by order of the court (less the deduction of \$50,000 previously paid as

provided in presently proposed order) regardless of the outcome of any further negotiations for settlement, [466] the said stipulation and award shall be vacated and any further attorneys' fees shall be determined by the court on such showing as the court may require, subject to agreement of the parties as to the maximum amount thereof at the conclusion of negotiations for settlement, if agreement thereon be reached. If no settlement be reached, any additional fees shall be judicially determined in said litigation.

The other terms of our letter of April 16, 1949, remain unchanged, except that the provisions of numerical paragraph 4 is open to further consideration in accordance with our prior conversation.

It is requested that you indicate your position on these suggestions by 12:00 noon, Monday, May 1, 1949.

Your proposal for an alternative to a dismissal with prejudice should be delivered to us by the same date and hour.

There is no occasion to indicate any specific amount of attorneys' fees until you have stated which of the above propositions is acceptable to you.

Yours very truly,

/s/ PEYTON FORD,

PEYTON FORD,

The Assistant to the Attorney
General.

(following in ink) [467]

PS. The time is set for Monday because of the shortness of time involved.

PF

Note: The above form of letter was sent to numerous attorneys among which were Mr. Chapman, Mr. Tremaine, Mr. Sutter and Mr. Thomas and the firm of O'Melveny and Myers.

The Court: As to the other matters, I still fail to see how they have any more materiality to Mr. Gilbert's application than any of the other files and records in this case.

Mr. Chapman: I would like to amend my offer and offer into evidence at this time all of the records, files, transcripts, and exhibit, documents and proceedings in the two consolidated cases, No. 5421 and No. 5678, and the related matter from the date of filing until the present time.

The Court: The court can take judicial notice of them, and for that reason they are already in evidence. I do not see any necessity to offer them particularly unless you expect that however this eventuates there will be an appeal in order to acquaint the appellate court with the rather monumental job of examining those files and records.

I anticipate, however, that by the time this appeal on this matter, however it eventuates, will get up there they will have already had some opportunity in connection with the [468] pending appeal to examine these records.

Mr. Chapman: In view of the court's statement I think there is no further argument on my part. If they are in evidence, they are in.

Mr. Angell: I wish to state the motions here being made are made on the files and records and papers and they are a part of the record here on this motion anyway.

The Court: I will not sustain the Government's objection that they are immaterial, I think everything in the files and records is material, but I do not see any need for particularly encumbering this record on this hearing at this stage with re-identifying particular exhibits. Now I can see it with relation to the particular matters that have heretofore been covered, the text of the orders and the letter of October 26 and of October 21 and the letter of April 27, 1949.

As, for instance, you refer in your application to the work you did in connection with the petition for an order to show cause as to the progress of settlement. Well, that is part of the files and records, and certainly I can take judicial notice of it. It is before the court to consider now, just as much as any of these matters that have been specifically introduced in evidence. And, as Mr. Angell has indicated, your motions are made on the files and records of these proceedings. [469]

Mr. Gilbert: That would likewise, under your Honor's observation, be true with respect, and more with the idea of focusing counsel's attention to things that we propose to touch on in argument, which will also be with reference to your Honor's

order of March 13, 1948, directing the San Francisco Bank to make the deposits—I am not making this as an offer at this time, but advising, if I may, things to which we will refer—and the motions therefor by the respective parties, Long Beach Federal of February 9, 1948, Mr. Westover's petition of February 24——

The Court: Counsel, in view of the fact that I take judicial notice of everything in the files and records and everything that has heretofore gone on in connection with this matter, you may in your argument choose to call my attention to anything because it is just as much in evidence as if it had been specifically and particularly introduced.

Mr. Gilbert: Very well, your Honor.

Now will that ruling, your Honor, also apply to testimony taken before the special master?

The Court: No. I do not know. Maybe I spoke too soon. The principle is that a court can take judicial notice of its own files and records and proceedings. Does counsel have any view on it?

Mr. Gilbert: Your Honor, it would appear to me that it is a part of the proceedings before the court. I should think [470] that your Honor would be just as entitled to take the official transcript of testimony given before the master the same as though you could take cognizance of testimony given before your Honor. I can see no reason for a differentiation between the two. They are both under oath in formal proceedings under your Honor's direction by his special master. [471]

April 7, 1950; 10:00 A.M.

The Court: Are there any *ex parte* matters?

The Clerk: No, your Honor.

The Court: *Mallonee vs. Fahey*.

Mr. Gilbert: Ready.

Mr. Works: Ready.

The Court: The clerk's calendar indicates the following on for hearing:

Hearing on motion of plaintiff Federal Home Loan Bank of Los Angeles for order directing payment of attorney fees on account. That is a further hearing.

Further hearing on motion of First Federal Savings & Loan Association of Wilmington for order directing payment of attorney fees on account.

Further hearing of the Los Angeles Bank for order directing repayment of moneys advanced by Shareholders Protective Committee.

Hearing on motion of plaintiffs for order requiring and ordering certain defendants, cross-defendants and third-party defendants to appear and testify, which appears to be a new motion.

And hearing on motion of defendant and cross-defendant Federal Home Loan Bank of San Francisco to dismiss the above-mentioned motion and to strike it and all supporting papers [564] filed in connection therewith.

Very well.

Mr. Works: May I direct your Honor's attention to Item No. 3, the application for the reimbursement of expenses?

The Court: Yes.

Mr. Works: It has been stipulated by all parties present that that matter may go off calendar, your Honor. I think that it will result in the ultimate saving of time to the court.

The Court: Off calendar. To be reset on notice?

Mr. Works: We had no understanding on that. Is it satisfactory to be reset by any party on 10 days, 15 days, 20 days?

Mr. Angell: On notice.

The Court: On notice.

Mr. Works: Fine.

The Court: Off calendar, to be reset on notice.

Mr. Works: Thank you, your Honor.

The Court: I am unacquainted with the contents of this motion for an order requiring certain defendants, cross-defendants and third-party defendants to appear and testify, and of course with the motion to strike it or dismiss it.

Whose motion is that?

Mr. Chapman: I am one of the moving parties, your Honor.

Mr. Westover: That is mine, your Honor. [565]

The Court: If I can see the file, and then if you will make a statement as to what your motion is.

Mr. Chapman: May I make a suggestion? I think that that is more likely to come up in rebuttal on our part when the motion for attorney fees and expenses are concluded. It may well be that if your Honor has read the affidavits—

The Court: No, I have not read anything.

Mr. Chapman: Well, the motion is directed to

about a hundred pages of affidavits that were filed and served on us about three weeks ago.

Mr. Bishop: Your Honor, I would like to state that it is our opinion that the hearing on the other motions could not be heard until that motion is disposed of, because it is supposed to be in connection with the application for attorney fees that they desire the relief requested. That is our very point, that not by the remotest chance could it have anything to do with it. It is not their motion for fees.

Mr. Chapman: I would like to urge the motion when our time comes, your Honor.

Mr. Westover: Your Honor please, may we have the appearances today? There have been some stipulations made.

The Court: Very well. Let us have the appearances.

Mr. Bishop, Mr. Angell and Mr. Dusenbery for the Federal Home Loan Bank of San Francisco.

Mr. Fitting for the official defendants. Mr. McKenna for [566] the Home Loan Bank Board and the official defendants.

Mr. Fussell, Mr. Whyte, Mr. Works and Mr. FitzPatrick for the Federal Home Loan Bank of Los Angeles.

Mr. Gilbert for the First Federal Savings & Loan Association of Wilmington.

Mr. Sutter for Title Service Company.

Mr. Westover for the Mallonee plaintiffs, and Mr. Chapman for the Long Beach Association.

Mr. Westover: Thank you.

Mr. Chapman: I would like to make an inquiry. I have been unable to keep track of just when Mr. Bishop, Mr. Angell and Mr. Dusenbery were and when they were not appearing for the officers and directors of the San Francisco Bank. Is this one of the "on" days or "off" days?

Mr. Angell: I think we had better get down to business instead of asking questions like that. If you look at the pleadings, we state in our pleadings who we appear for on each motion, and in this particular motion we are appearing for the San Francisco Bank.

The Court: And nobody else?

Mr. Angell: And no one else, as our appearances show.

The Court: This motion about producing somebody to testify states:

"You and Each of You, Will Please Take Notice, That [567]

"1. The plaintiffs, Mallonee, Bucklin and Fergus, the Shareholder Members Protective Committee of the Long Beach Federal Savings & Loan Association;

"2. Long Beach Federal Savings & Loan Association, cross-claimants and third-party plaintiffs;

"3. Title Service Company, a corporation, defendant and cross-claimant in interpleader;

"4. Robert H. Wallis, defendant and cross-claimant in interpleader; and

"5. George Turner, defendant and cross-claimant in interpleader:

"Will on Friday, the 7th day of April, 1950, at

the hour of 10:00 o'clock a.m. or as soon thereafter as counsel may be heard, in Courtroom No. 1 of the Honorable Peirson M. Hall, United States District Judge in the United States Courthouse and Post Office Building, Los Angeles, California, present to the honorable court their motion for order of court requiring defendants and cross-defendants Home Loan Bank Board, et al., and their deputies, agents, employees, etc., to appear and testify. Reference is made to said motion for further particulars. Said motion will be based upon all of [568] the pleadings, papers, files, documents and records in the above-entitled action and upon this notice and motion including memorandum of points and authorities and affidavits attached thereto."

And the motion is that the parties on whose behalf it is made move the court for an order requiring John H. Fahey, A. V. Ammann, Home Loan Bank Board, Federal Savings & Loan Insurance Corporation, William K. Divers, O. K. LaRoque, J. Alston Adams, John M. Wyman, R. J. Strecker and Irving Bogardus to appear and testify. The motion mentions them in their several individual and former official capacities.

Is this in relation to the application for fees?

Mr. Works: We say that it is not.

The Court: It does not appear to be. It states:

"Said motion will be based upon the following grounds:

"1. That said defendants and cross-defendants, (a) to (j), have filed with this honorable court for consideration, and have urged that said court make

orders and judgments thereon, approximately 110 or more pages of affidavits, exhibits attached thereto, and other evidentiary matter, and

“2. That such purported evidence, etc., is in the form of hearsay, opinion, legal conclusions, surmise, guess, and inference, each and all of [569-70] which are not based upon facts, or actualities. That to demonstrate the falsity, or to verify the accuracy thereof, requires the test of cross-examination of such witnesses personally present in court * * *”

Mr. Chapman: Your Honor, I think I should be heard on this situation.

I think your Honor recalls that you made an order permitting the late filing of so-called counter-affidavits. In furtherance of your Honor's order, certain affidavits were filed. Among the affidavits filed were these referred to in this motion.

In my view those affidavits are not pertinent to the matter of attorney fees, but we did not desire to make a motion to strike, nor to take that matter from consideration by your Honor at some time. We feel that the matter presented in those affidavits should be decided by this court.

The Court: You say:

“That most of the allegations set forth in said affidavits and exhibits are extraneous to the issues of allowances of attorneys' fees to the moving parties * * *”

Mr. Chapman: That is right.

The Court: “* * * but if in evidentiary form, and if truthful, would, or might in part, be pertinent [571] to the decision of issues concerning the

Long Beach Association, its seizure and attempted confiscation * * *”

If you think that is true, why not make a motion to strike them?

Mr. Chapman: I was coming to that point now, your Honor.

The Court: Very well.

Mr. Chapman: When they have presented to you matters for decision after denying your jurisdiction for years, we would like to have you decide the matters that they thus present to you. We would like to have the decision based on their personal cross-examination here in court, which we are prepared to show are within your power.

I don't think that you need to hold up the proceedings on attorneys' fees until you complete that matter. Our motion to strike would simply take it from your consideration because it is not now pertinent to attorney fees matters which they have presented generally and which are pertinent to the main litigation.

The Court: If that is the case, then why do you not have discovery on it if it is pertinent only to that? Where are these 110 pages of affidavits that they are talking about? Do you know, Mr. Clerk?

Mr. Chapman: I think I can locate them if I may have the latest file. [572]

Mr. Westover: We received them on March 20th.

(The documents referred to were passed to the Court.)

The Court: Let me ask this question: Was there

filed in opposition to the motion for attorney fees an affidavit of John H. Fahey?

Mr. Chapman: Yes, several. More than one in the same filing. One was dated sometime in March, 1950, another was dated either April 19 or April 21, 1949, approximately 11 months prior to the filing date and nearly a year prior to the present hearing date.

The Court: There are two affidavits?

Mr. Chapman: Two or more of Mr. Fahey's.

The Court: Mr. Fitting, how many were there? Do you know?

Mr. Fitting: I could probably tell you. There were filed six affidavits in all.

The Court: By Mr. Fahey?

Mr. Fitting: No. Two by Mr. Fahey, one dated April 19, 1949, and one dated March 18, 1950.

The Court: There was an affidavit by Ammann?

Mr. Fitting: That was filed a little earlier.

The Court: Was there an affidavit filed by Ammann in opposition to the motion for attorney fees?

Mr. Fitting: Yes, about the 15th I believe. I think that was filed about the 15th. [573]

The Court: One affidavit?

Mr. Fitting: Yes.

The Court: Filed the 15th?

Mr. Fitting: Yes. That was filed earlier than this group.

The Court: When was it filed? I will have to know the date or we cannot locate it.

Mr. Angell: Either by or before March 15, when the Ammann affidavit was filed.

Mr. Fitting: It was filed on the 15th.

The Court: March 15?

Mr. Fitting: Yes.

Now these others, all the others, were filed on March 20th.

There were two Wyman affidavits, one dated April 19, 1949, and one dated March 17, 1950.

The Court: Yes.

Mr. Fitting: Then there was an affidavit of William K. Divers, dated March 18, 1950.

The Court: One affidavit of Divers?

Mr. Fitting: That is right.

Then there was one of R. J. Strecker.

The Court: Filed March 20th?

Mr. Fitting: Yes.

The Court: And dated when? [574]

Mr. Fitting: Dated April 22, 1949.

Then in addition I presume the motion also attacks Mr. Bogardus' affidavit, which was not filed by us but by the Bank, which also was dated on the 20th, I believe.

The Court: And its date?

Mr. Fitting: That affidavit is dated March 17, 1950.

The Court: There was no affidavit filed by La-Roque or Adams or the Federal Savings & Loan Insurance Corporation or the Home Loan Bank Board. Of course I do not know how they could make affidavits anyhow.

Mr. Chapman: I think the affidavit by Mr. Divers, your Honor, recited his various capacities.

including the Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation.

I think the first matter for consideration is whether or not your Honor is to consider this hundred pages of affidavits in connection with attorney fees. If you are, then our motion must be heard now. If you are not, if those are to go to a later date, then the motion likewise can be heard at a later date.

The Court: Is there a motion to strike these affidavits on the ground that they are immaterial?

Mr. Chapman: No, and I do not want to strike them, your Honor, from the files generally. They might be stricken from your consideration of attorney fees, but I have no intention [575] of letting these defendants escape from the court when they have submitted these issues to you for decision. They are general issues that go further than attorney fees; it is a submission to you for decision of matters that they are now appealing to the Circuit on the ground that they want to decide them themselves. I am certainly not going to let them go in and go out on a motion to strike.

The Court: When was Fahey's affidavit filed, both of them?

Mr. Fitting: Both were filed on the 20th.

The Court: March 20th?

Mr. Fitting: Yes. All of those affidavits were filed on the 20th except Ammann's affidavits.

The Court: The movants are not making any motion to strike these affidavits?

Mr. Works: I will move to strike them at the

present time, your Honor, that is, from consideration as to the merits of the attorney fees application, on the ground that they do not go to prove or disprove any material issue in connection with that application.

Mr. Chapman: I have no opposition to striking them from consideration of attorney fees, but I do oppose any motion to generally strike them from consideration in the case.

Mr. Bishop: To which motion we make objection on the ground that it is not timely or presented in the proper manner. [576]

Mr. Works: I will concede that they are entitled to notice if they desire on such a motion, your Honor.

Mr. Angell: These affidavits are filed in response to affidavits filed by the movants or by—I think they were all filed by Mr. Chapman and Mr. Westover—and they are answering those affidavits and statements made therein, and Mr. Gilbert's affidavits, in which in those affidavits, either directly or by inference, it is stated the reasons for the dissolution of the Los Angeles Bank and the making of the orders which led to and accomplished the creation of the San Francisco Bank, also the reasons for appointing a conservator. That is, it states their idea of what the reasons were.

The Court: I do not think that in the matter of the application of attorney fees here that this court is called upon to make a decision as to whether or not the plaintiffs' positions are correct or the defendants' positions are correct. It is an application for an interim allowance, and under the decisions

which have been collected and cited in the memorandums heretofore presented, and the findings of fact and conclusions of law that I have relied upon, it is not necessary that this court make a finding that the plaintiffs are correct or were correct in the commencement of their suit in order for them to have an allowance of attorney fees, if it is a true class action, and if they are entitled to litigate. [577]

Mr. Angell: It is not our position that if, assuming legally they were entitled to receive interim allowance for attorney fees, and assuming the court had jurisdiction in this case, that the court would have to determine the issues in the case to make any interim allowance. These affidavits are in response——

The Court: Is it your position that I have to make a decision on the merits?

Mr. Angell: Certainly not, your Honor. You would not have to. These affidavits are not filed for that purpose. These affidavits are to deny facts stated, which we believe to be entirely immaterial to the question of interim allowance of attorney fees, but we are not going to have them undenied in this record.

Mr. Works: There you have it on both sides. I will renew the motion to strike.

Mr. Angell: If they strike our affidavits then we ask that the affidavits to which they are responsive be stricken also.

The Court: In so far as they apply to the motion for attorney fees?

Mr. Angell: Yes.

The Court: It looks to me like that makes good sense. Do I have to read them all before I strike them?

Mr. Angell: If they are stricken, let me ask that they [578] be stricken for all purposes and not the reservation suggested by Mr. Chapman that these affidavits, by filing them, we have submitted to the general jurisdiction of the court. They were submitted solely for the purposes of this motion, and that is the only thing they are in here for. If our affidavits are stricken, then we ask the affidavits to which they are a reply be stricken also.

The Court: What are those affidavits to which they are a reply?

Mr. Fitting: If the court please, there is an affidavit of J. Howard Edgerton and one of Tracy Skelton which was filed, I believe, by Mr. Gilbert.

The Court: Just a moment. When was the affidavit of J. Howard Edgerton filed?

Mr. Fitting: That was filed by Mr. Gilbert about March 15th.

Mr. Gilbert: Not Edgerton.

Mr. Fitting: Excuse me. That is Tracy Skelton. Tracy Skelton's affidavit was filed about March 15th by Mr. Gilbert.

The Court: And Edgerton?

Mr. Fitting: And Edgerton's was filed on the same day I think by Mr. FitzPatrick and O'Melveny & Myers.

The Court: That is, the affidavit of Edgerton?

Mr. Fitting: Yes, J. Howard Edgerton.

Then in addition Long Beach in their opposition

or their [579] response incorporated their response which was, as I recall it, served in court on one of the hearings, on February 27th at the hearing when there was a response filed and served by Long Beach, incorporating the Tenth Intermediate Report of the Select Committee to Investigate Executive Agencies, which was the report on the merger of the banks and the conservatorship.

The Court: What else do you want to strike?

Mr. Fitting: Then there was some testimony, and in those affidavits in addition there was some discussion, of these spot checks and the purposes of these spot checks. Those spot checks are tied in to them also.

The Court: There was some testimony as to spot checks?

Mr. Fitting: Yes.

The Court: Who testified to that?

Mr. Fitting: I think it was Mr. Skelton who testified.

The Court: Well, the affidavit of Wyman is the one that goes to that, is it not, the affidavit of Wyman dated the 17th of March?

Mr. Fitting: Yes, that covers it. The Divers affidavit of March 18 also deals quite specifically with that. Mr. Fahey's affidavit of March 18, 1950, deals with that, and Mr. Ammann's affidavit deals with that.

The Court: Mr. Skelton was produced here and testified.

Mr. Fitting: Yes. [580]

Mr. Gilbert: Yes, he did.

The Court: What other affidavits?

Mr. Fitting: Mr. Berry and Mr. FitzPatrick, I believe, in their affidavits also deal with this spot check.

The Court: Mr. FitzPatrick's affidavit was filed in reply to somebody else's affidavit, was it not?

Mr. Fitting: Yes, in reply to Ammann's affidavit.

Mr. Angell: And Ammann's is filed in reply to Mr. Berry's.

Mr. Works: May I make a suggestion? Everybody seems to agree that these affidavits we are discussing now have no relevancy as far as the attorney fees applications are concerned.

Are you gentlemen willing to stipulate that these affidavits may remain in the file but they need not be considered by his Honor in connection with the attorney fees applications, and then if Mr. Chapman wants to go on with his motion after that, that is up to him.

Mr. Angell: No, we will not so stipulate.

The Court: You mean you want to withdraw them after they are filed?

Mr. Angell: We don't want to withdraw them.

The Court: That is all he asked you.

Mr. Angell: We will not stipulate to withdraw the affidavits. [581]

The Court: He did not ask you that, he asked you if you would stipulate that they may not be considered by the court, the affidavits which have been mentioned up to now will not be considered by the court, in connection with the application for attorney fees.

Mr. Angell: I wouldn't enter into that stipulation at this point.

Mr. Works: I wouldn't ask you for it if it wasn't for the fact that I understood you to say a moment ago that they were not material to the attorney fees applications.

The Court: That is correct. That is what you stated.

Mr. Dusenbery: If the court please, with respect to the affidavits that were filed here by some of the witnesses for the moving parties, as I recall there are portions of those affidavits—

The Court: They were not witnesses.

Mr. Dusenbery: Well, affiants.

The Court: They were affidavitors.

Mr. Dusenbery: Very well. I think that is a good word too.

Anyhow, there are portions of those affidavits that do relate to the attorney fees and the matters directly connected with it.

There are other parts of it that go to the merits of the case. Now we have difficulty there I think in apportioning [582] the parts of those affidavits that pertain to the issues here and those parts which would be proper to consider I think only on a trial of the case on the merits.

Mr. Works: If you will pick them out, Mr. Dusenbery, I will stipulate that they may be considered, those parts.

Mr. Chapman: I wonder if I may say a word. I have been waiting quite a little while here.

The Court: Let us see if Mr. Fitting has given

all the affidavits now which Mr. Angell says are immaterial and filed on behalf of the movants or not filed by this side of the table.

Mr. Fitting: Affidavits that raise questions on the merits.

However, I want to make the Government's position clear. As discussed on page 3 of our opposition, it is the Government's contention of course that the allowance of attorney fees is dependent upon the successful prosecution of the litigation.

Mr. Angell: And I want to say that that is our position too. I do not mean to say that there was nothing in these affidavits sought to be stricken as not material even though this were a proper application for allowance for interim attorney fees, nor do I mean to be understood as saying that we do not raise the question and stand on the proposition that, first, the court lacks jurisdiction to make any such allowance [583] and, secondly, that they cannot be allowed under the law because there is no provision in a case of this kind for the allowance of interim attorney fees.

The Court: In so far as the position of the Government is concerned, that the power of the court in this case to make allowance of attorney fees is dependent upon the success of the litigation, I have heretofore upon various occasions held to the contrary, and I adhere to it, and in that connection I think I am supported by a plethora of authorities.

Mr. Angell: The San Francisco Bank takes the same position as the Government in that.

The Court: So it does not seem to me that these

affidavits that go to the merits of the situation have any place for consideration here. I have just granted at one or two of them, and it would seem to me that they are just arguments made in justification of some action which has been taken in the past. I do not say that as to all of them.

Mr. Chapman: Mr. Fitting, have you concluded listing the affidavits?

Mr. Fitting: I was going to say something about listing the affidavits.

I am not anticipating a motion to strike the affidavits——

The Court: You have a motion to strike them, have you not? [584]

Mr. Fitting: No, sir, we have a motion to strike their motion.

The Court: A motion to strike their motion?

Mr. Fitting: Yes.

However, I am not certain that I have listed or discussed or pointed out all the places or all the affidavits and all the places in the evidence where the merits are discussed.

Mr. Works: Mr. Fitting, may I say a word? As I conceded a few moments ago, you are certainly entitled to notice on such a motion, and in view of that situation I will withdraw our motion to strike these affidavits and try to get around it in some other way by having your Honor released from having to read them at this time.

The Court: If they are all in here I will have to read them, and I have a lot of other things to do, and I do not know when I will be able to get

around to reading them before I can pass on your motion for attorney fees. And even after I read them all I may strike them on my own motion. But I do not know when I am going to get at it. You are anxious to get your matter of the decision on attorney fees, so it would seem to me that we should cut out all the underbrush which is, of course, the great problem in this case all the way through in trying to decide any phase of the litigation. Everybody wants to bring in every phase, and all the time I have been up against the proposition of trying to keep on the beam in [585] the matter that is under consideration.

If you want to throw out these affidavits and motions in here, that is your privilege, but it is my duty if I read them through and think they are not material, to order them stricken. Now if you do not want to make a motion to strike——

Mr. Works: My hands are tied there. They are entitled to notice.

Mr. Bishop: Before we proceed further, I would like to point out for the record that this door was opened up by our opponents, not by us. The minute you file a complete report on a congressional hearing that covers many of the phases of this case, and particularly in view of the court's——

The Court: I can take judicial notice of it whether it is filed or not. Are you going to file affidavits against everything of which I can take judicial notice?

Mr. Bishop: Well, your Honor had just previous

to the filing of that document that contained that congressional report, taken us to task that we had no denials on file here, and in view of that ruling we could do nothing else but attempt to respond to everything that was here.

Mr. Chapman: I think it is quite apparent, if I might make the point about the order you made, about when an affidavit should be filed. You required all filings in your order to be in at a certain time.

The Court: Yes, and they came down and got some extension. [586]

Mr. Chapman: And that extension was only to apply to two affidavits which had been filed upon them later—one was Edgerton's and the other was Berry's—and the hundred pages do not reply to those matters. They go into other things which had been filed for weeks.

Not only that, the material that they have filed is stale. It has been in their hands for 11 or 12 months. They have had every opportunity to present it to the court before.

The Court: That is all a very fine argument in support of a motion to strike.

Mr. Chapman: I don't want to strike it from the case generally because I think it has to do with jurisdiction, but I would like to see it go out from the question of attorney fees.

The Court: Do you move to strike it in so far as the question of attorney fees is concerned?

Mr. Works: I will request that the court strike it from consideration in connection with the motion

for attorney fees on the court's own motion. Your honor can pass on the materiality just as well now as any other time. As far as I am concerned, they are entitled to notice of motion.

The Court: I can order shortening time to right now.

Mr. Chapman: That is how they got their extension.

Mr. Fitting: What we would like is an opportunity to [587] pick out what we would like stricken too.

Mr. Angell: That is the evil of it, your Honor. If there is a motion to strike we would have to study these affidavits to which these were filed in reply and ascertain what parts of those affidavits should go out.

The Court: Well, in looking at the affidavits here, gentlemen, I realize that all of you are entitled to represent your clients in the way that you think is necessary with complete protection of their rights. But again I want to emphasize that in this case every time anybody comes into court on anything everybody tries to bring in all the issues on the merits. And these affidavits that I have glanced at here, as I have had to hurriedly do during this discussion, they go to the case on the merits and they do not go to the question of whether or not there are allowable attorney fees.

In so far as your position that they must be successful to be entitled to attorney fees, it does not make any difference in support of your legal position whether or not you are able to show that it is

meritorious or not meritorious if it is dependent upon ultimate success, because obviously there is no ultimate success.

Mr. Angell: On that particular point, that is true.

The Court: So I would like to get something here to decide. It looks to me like I certainly am not called on at this time to decide the merits of the case. [588]

What is the present status now? You have moved, Mr. Chapman, to strike the affidavits of Fahey of April 19, 1949, and March 8, 1950, of Ammann of March 15, of Wyman of April 19, 1949, and March 17, 1950, of Divers of March 18, 1950; of Strecker of April 22, 1949, and of Bogardus of March 17, 1950, in so far as they are to apply to or be considered in connection with any application for attorney fees now pending before the court. Is that your motion?

Mr. Chapman: On that limited basis, your Honor, yes; with this reservation, that we want those issues presented by those affidavits decided by you—they have been presented to you by these people—but not on your present hearing on attorney fees.

Mr. Angell: We object to that.

The Court: If they are stricken in so far as this hearing is concerned, and I have before me a motion for attorney fees, I have nothing else before me.

Mr. Chapman: Then I cannot make that motion, your Honor, because I feel what they have done is bring before you of their own volition issues we

have been trying to get them to submit here for nearly four years. I think that they have made available to us by these filings remedies in your ordering them to come here and testify which might not otherwise have been available. And while I want to see the attorneys paid, I don't want in any way to prejudice the main case when [589] someone inadvertently or genuinely has submitted matters to you for ultimate decision.

The Court: I will strike the affidavit of Fahey, of Ammann, of Divers, of Wyman, of Strecker and Bogardus on the ground that there is no showing before this court that they cannot be made to come here and testify at this hearing. It is stricken in so far as the hearing on the motion for attorney fees is concerned.

Mr. Fitting: Might we move to have stricken from the record all the other affidavits or portions of the testimony that tend to prove or disprove any of the——

The Court: In so far as the testimony of Tracy Skelton is concerned, he was here and testified. I ruled at that time on the question of the materiality of his testimony, and it was admitted.

Mr. Angell: For the record, the San Francisco Bank joins in the motion to strike those affidavits.

The Court: The affidavit of Ammann is filed March 14th, the one that I refer to, and is dated March 9, 1950.

Now I am looking for the affidavit of Edgerton.

Mr. Fitting: That would be filed the 14th or 15th also.

The Court: Who filed this affidavit? Richard FitzPatrick?

Mr. FitzPatrick: Yes.

The Court: What is the materiality of Edgerton's affidavit [590] to the application for attorney fees? Can you tell me quickly so I will not have to read it through?

Mr. FitzPatrick: I don't think there is any materiality as to the application for attorneys' fees, your Honor. It was in answer to immaterial allegations raised in the affidavits of Riordan and Moore.

The Court: Who is Riordan?

Mr. FitzPatrick: An official of the Federal Home Loan Bank Board.

The Court: What date was his affidavit filed?

Mr. FitzPatrick: I don't have the filing date. The date of the affidavit was September 21, 1949. It was attached to the memorandum in opposition to motions for orders directing payment of attorney fees.

The Court: Filed when?

Mr. Fitting: Filed September 23, 1949.

The Court: The affidavit of Riordan?

Mr. Fitting: The affidavit of Riordan.

The Court: And the affidavit of Moore, too?

Mr. Fitting: And Moore was filed September 23, 1949, in our original opposition filed at the time that the motions were first filed.

The Court: As I see Edgerton's affidavit, it all goes to whether or not the members of the Bank wanted to dissolve or did not want to dissolve. [591]

Mr. FitzPatrick: Yes.

The Court: Is that what Riordan's and Moore's affidavits went to?

Mr. FitzPatrick: Moore's affidavit had to do with the organization of the Federal Home Loan Bank of Los Angeles and that no hearing was requested by anybody in connection with its consolidation with the Portland Bank and attached a copy of the certificate of the organization of the Los Angeles Bank.

Riordan's affidavit had to do with who owned the capital stock of the bank, in what proportion and what was the book value of that stock.

The Court: In other words, they both go to the merits?

Mr. FitzPatrick: In my opinion, yes.

The Court: The affidavit of Moore is stricken on the court's own motion, as is also the affidavit of Riordan, both of which I have just now located. That is to say, the affidavit of J. Francis Moore, filed in this court on September 23, 1949, which affidavit is dated the 21st of September, 1949, and the affidavit of Ernest E. Riordan, filed in this court on September 23, 1949, and the affidavit is dated the 20th of September, 1949, on the ground that they are immaterial.

On the court's own motion, the affidavit of Edgerton, dated the 13th of March, 1950, and filed March 14, 1950, is [592] stricken on the same ground, and they are stricken in so far as they apply to or are to be taken into consideration in connection with the pending application for attorney fees.

Mr. Fitting: Now, if the court please, there is

also an affidavit by Mr. FitzPatrick filed January 31, 1950.

The Court: That is filed in response to Ammann's affidavit, is it not?

Mr. Fitting: No. This was filed before Ammann's affidavit was filed.

The Court: Filed before? Do you know when Ammann's affidavit was filed?

Mr. Fitting: In March. This was filed January 31, 1950. It deals primarily with what Mr. Keller has to say about the consolidation of the banks.

Mr. FitzPatrick: It, too, was filed in opposition to the affidavits of Moore and Riordan which your Honor has already stricken.

The Court: As immaterial.

Mr. FitzPatrick: As immaterial to this present application for fees.

Mr. Works: Do you move to strike that affidavit, Mr. Fitting?

The Court: Do you move to strike the affidavit?

Mr. Fitting: If our affidavits are stricken then——

The Court: Do you move to strike it? [593]

Mr. Fitting: Yes, I do.

The Court: What is the date of the affidavit, and when was it filed?

Mr. Fitting: It was filed January 31, 1950.

The Court: That is the affidavit of Mr. FitzPatrick?

Mr. Fitting: Yes. The date of the affidavit is January 5, 1950.

The Court: It is stricken on the ground that it

is immaterial in so far as the application for attorney fees is pending and in any consideration in connection with them.

Mr. Fitting: Then there is an affidavit of Mr. Gregory filed March 15th, also dated March 15, 1950, dealing with roughly the same material, or with some of the same material covered in the other affidavits.

Mr. Chapman: I want to be heard on that, your Honor.

The Court: You may have to talk pretty fast.

Mr. Chapman: Then I had better start now.

The Court: Wait until I find the affidavit.

I see here in the beginning you refer to an affidavit of Bogardus. The affidavit of Bogardus is stricken so I cannot see, if this were filed merely to counter things that were stated in any of the affidavits which I have stricken, that it would be material.

Mr. Chapman: It happened, your Honor, to contain exhibits which are material to the attorney fees question, particularly [594] the claim of estoppel which has been seriously raised here, and in view of the Supreme Court's decision when we were back there two or three years ago that it is an important question. It contains affirmative evidence that the San Francisco Bank is the party estopped and not the shareholders, as they contend. It has their own dividend checks.

The Court: They contend that the shareholders are estopped from what?

Mr. Chapman: From questioning the existence

of the San Francisco Bank or from having any lawsuits or from having any attorney fees.

The Court: You do not have any application for attorney fees pending.

Mr. Chapman: In a class action, your Honor, everybody's application affects everybody. We have \$600,000 of our money supposedly in stock in the San Francisco Bank. Any attorney fees paid to anybody about 8 cents to 10 cents on the dollar, or some fraction, come out of our pockets.

Mr. Angell: They are not asking to pay less, they are asking to pay more.

Mr. Chapman: If we want to help pay something to get our bank back, that is our privilege. We have joined in the motion for granting attorney fees instead of resisting it, so in part at least it is our motion. These exhibits are highly material to the question of estoppel which has been serious [595] throughout this case. They are not merely a counterpoint, they are an independent point on their own and they were filed in time within the court's own order without an ex parte extension. I think for the exhibits alone it is material that they stay in the affidavit.

The Court: Very well. I will strike all of the affidavit except the exhibits.

Mr. Chapman: You have to identify them and explain them in the affidavit.

The Court: They are dated on their face. They appear to be what they are.

Mr. Angell: That affidavit, your Honor, was filed in response to Mr. Bogardus' affidavit.

Mr. Chapman: On the contrary, I filed that affidavit and it was filed independently in the time given by the court. It refers to Bogardus' affidavit, but it is not merely a responsive affidavit.

The Court: The affidavit of Gregory filed March 15, 1950, and dated March 15, 1950, is stricken as being immaterial on the application for attorney fees or any matters to be considered in connection therewith, except that the exhibits attached to that affidavit, which are photostatic copies of various documents——

Mr. Chapman: Exhibits B and C, your Honor?

The Court: A, B and C will remain for consideration in [596] connection with the assertions of estoppel or counter-estoppel, if there is such a thing as counter-estoppel.

Mr. Bishop: Your Honor, I would like to be heard on that.

There are two affidavits of Mr. Bogardus here and Mr. Chapman's affidavit was filed in response to an affidavit that we filed in the latter part of February of 1950 or early in March.

Mr. Chapman: I deny that statement. I filed my affidavit and I know why it was filed. It is not entitled in response to anything.

Mr. Bishop: Well, anyway, we had filed an affidavit previously of Mr. Bogardus in which we refer to the number of shares held by——

The Court: Just a moment now. I struck the affidavit of Bogardus of March 17, 1950. I was under the impression that that was the only affidavit that Bogardus filed.

Mr. Bishop: That is not correct.

The Court: That is not correct?

Mr. Bishop: No, sir. There are two affidavits of Mr. Bogardus. I am now talking about another affidavit of Mr. Bogardus that was filed at an earlier date.

The Court: And which is not stricken?

Mr. Angell: That is right.

Mr. Bishop: And that is what we assumed, and I am not [597] trying to bind Mr. Chapman at all.

The Court: Very well. That being the case, if the affidavit of Bogardus of the earlier date was not stricken, this goes to matters which are set forth in that affidavit, so the affidavit of Gregory will remain.

Is that clear? I will reverse the order I just made striking Gregory's affidavit and leave it in together with its exhibits.

Mr. Bishop: Then in view of what has transpired, I would like to have our motion to strike Mr. Chapman's motion to have these parties appear and testify heard, and I would like his motion stricken because he has admitted that it had no materiality to these proceedings. Therefore it cannot remain on the files and records of this motion.

The Court: The motion of Mr. Chapman and the motion to strike it will go off calendar.

Mr. Bishop: In that connection, at this time I would like to ask the court that Mr. Noon be discharged in connection with the subpoena heretofore issued calling for our records to be used at this trial or this hearing in connection with attorney

fees or expenses, because it has no materiality what we spent or didn't spend.

The Court: I will defer ruling on that. I think it does have.

Mr. Chapman: I certainly want to be heard before my subpoena [598] is discharged, your Honor.

The Court: What you spent or what you did not spend I think is material.

Mr. Bishop: Again I urge that he is not the person claiming fees here.

Mr. Chapman: We joined in their motion.

The Court: There was an affidavit of Mr. FitzPatrick filed in response to Mr. Ammann's affidavit which I struck, was there not?

Mr. Gilbert: Yes, there was, your Honor.

Mr. Works: Yes.

The Court: What did we do with that affidavit?

Mr. Fitting: I think that should be stricken if Mr. Ammann's is stricken since it answers Mr. Ammann's. That was filed about April 6, I believe—no, about March 31st.

Mr. Gilbert: March 30th, I think, was the filing date of Mr. FitzPatrick's affidavit to which Mr. Fitting now refers, and that was in response to Mr. Ammann's affidavit of March 15, 1950.

The Court: I have stricken Mr. Ammann's affidavit of March 15 as not being material, and also on the further ground, as I indicated, that there is no showing that these parties are not able to be in court and testify.

Mr. Gilbert: In connection with those two affidavits, your Honor, it is Mr. FitzPatrick's personal

wish and request, [599] because of the matters contained in Mr. Ammann's affidavit with respect to this question of conduct, and that although he has denied those charges and explained them in his affidavit, he nevertheless has asked me to tender him as a witness at this time in connection with that conduct in the event your Honor should desire to ask him any questions about it or in the event any counsel should desire to cross-examine him in connection with it.

Mr. FitzPatrick: I would like to join in that statement.

The Court: I understand that Mr. FitzPatrick's affidavit is made in connection with some statement contained in Mr. Ammann's affidavit to the effect that Mr. FitzPatrick went out and solicited business among the home loan associations.

In the first place, such a statement is wholly immaterial and incompetent. In the second place, in Ammann's affidavit it is already stricken because the affidavit is immaterial and because there is no showing before this court that Mr. Ammann cannot come here and testify at this hearing. I think therefore that any response in connection with it should also be stricken, and I do not think it is material whether Mr. FitzPatrick went out and saw home loan associations in connection with his application for fees at this time or not.

Mr. Fitting: Now, if the course please, that gets again to the question of the spot checks. In their various affidavits [600] and in their testimony they contended that the spot checks were for the purpose

of intimidation and of seeing what associations were paying, whether associations were paying money or planning to pay money to defend suits. Ammann's affidavit sets up the purpose of the spot checks from the point of view of the Board and from his point of view.

The Court: I have just stricken it.

Mr. Fitting: Now it seems to me that then the spot check testimony perhaps should be stricken because certainly if there is testimony as to spot checks we should be permitted to put in testimony as to what the spot checks were for.

The Court: Bring Mr. Ammann here.

Mr. Angell: I call your Honor's attention to the fact that under rules on motions we are not required to bring every witness here, but the motions under the rules should be heard on affidavits, and we have filed those affidavits. So I wish to call to your Honor's attention that under the rules we are not required to produce a witness.

The Court: This is an adversary proceeding on the application of attorney fees. My rulings will stand.

Are we ready now to get down to what we came here for?

Mr. Angell: I would like to move to strike the affidavit of Charles Berry of February 27, 1950. I do not think it was stricken. That has to do with spot checks. It also has to do with being present at the testimony of witnesses before the [601] congressional hearing.

The Court: February 27?

Mr. Bishop: It is a 2-page affidavit prepared by Mr. Gilbert.

The Court: You mean filed by Mr. Gilbert?

Mr. Bishop: I don't know who prepared it.

Mr. Gilbert: The purpose of that affidavit, your Honor, or one of them, was to show that the seizures in both instances, of the Long Beach Federal and the Federal Home Loan Bank, were made for the reason that those two organizations appropriated funds for legal counsel and expenses to fight the seizure.

Mr. Angell: Now that is just the evil of this whole thing, your Honor, and why we object to this procedure. Here we have counsel saying that the purpose of these affidavits was to show the purpose of what he calls seizures, when those officials of the Board were merely doing their duty under the Act.

Now if the purpose of that was to do what Mr. Gilbert says it was to do, we have a right to have those affidavits in here to show in this proceeding that that wasn't the reason for either dissolving the Bank or appointing a conservator.

Now Mr. Gilbert has put his finger right on the evil of this whole procedure, and we will meet ourselves coming back [602] if we didn't deny that that was the purpose of it.

Mr. Gilbert: All we did in that affidavit was to quote the testimony under oath given at the congressional hearing that that was the reason.

The Court: If that is the case, I will strike the affidavit because I can take judicial notice of the testimony under oath.

Mr. Angell: Of course, your Honor, it is our position that any testimony before the congressional committee, even if it can be taken judicial notice of for any particular purpose, cannot be taken judicial notice of for any of the purposes of this hearing. That was not a trial. A congressional committee is not a court, and testimony taken before that body is not in evidence before this court in this proceeding.

The Court: I will take judicial notice of it in so far as it is material. I can take judicial notice of hearings before Congress, reports to Congress, public hearings.

Mr. Bishop: Without waiving the former point, if the court is going to take judicial notice of that famous, or infamous document—I don't know which to call it—then by the same token we have a right to rebut it, and that is why none of our affidavits can be stricken out.

The Court: The affidavits are stricken on the ground I have heretofore indicated, and I will take judicial notice of the hearing and of the report and of the contents of the matter [603] in so far as they are applicable, or of any other congressional hearing.

Mr. Fitting: I wonder if your Honor could indicate to us sometime what portions of the report you do rely on so that we might have an opportunity to rebut that. It is hard to tell how to meet the report if we don't know what parts you are relying on.

Mr. Angell: The San Francisco Bank joins in that request.

The Court: I am not going to sit down and say, "I take judicial notice of line 5, page 16, these five words, and not of the next ten" at all. I take judicial notice of the whole thing in so far as any portion of it is material or applicable to this proceeding.

Mr. Fitting: If the court please, how can we meet it then except by filing affidavits meeting the whole thing, which is just what we tried to do here.

Mr. Angell: In that respect, I wish to call your Honor's attention——

The Court: I do not take judicial notice of the truth or falsity; I take judicial notice of the report and its contents, and the fact that there were hearings on such-and-such day and that somebody said so-and-so. But I do not take judicial notice of the fact that he was then telling the truth or was not telling the truth. For that reason I can see [604] no necessity for allowing anybody an opportunity to deny or to controvert that.

Mr. Bishop: Then your Honor, by the same token, I think that our affidavits contain information that you must take judicial notice of because almost all of the information therein contained is actually and almost in every instance a report of one official to another official, even going to the President of the United States.

The Court: If they sit down and write letters to one another exculpating themselves from any

violation of the law or saying that they were doing everything in compliance with the law, if you call my attention to it I will take judicial notice of it but not of the truth or falsity of it.

Mr. Angell: Then I would say you are indulging in a presumption of wrongdoing against a public official.

The Court: I am not doing anything of the kind.

Mr. Dusenbery: There is some of these proceedings with respect to the affidavits that go a little bit beyond my previous experience, and in order to keep the record straight and in the interest of clarity, I now move the court that all of the affidavits filed in support of these petitions for attorney fees that have not already been stricken by the court be now stricken on the ground that there is no showing with respect to those affidavits that the individual affiants could not be produced to testify. [605]

Mr. Chapman: I oppose that motion, your Honor.

Mr. Gilbert: Does that include our personal affidavits setting forth our services?

The Court: I think when the matters were presented by Mr. Works he stated that somebody was present to testify but if counsel did not object that the affidavit would stand. I think you filed an affidavit then.

Mr. Works: Mr. Fussell and Mr. FitzPatrick are present in the courtroom right now.

The Court: And they were present at the time, if my recollection serves me correctly.

Mr. Works: Surely.

The Court: And you proffered them as witnesses, if my recollection serves me correctly, and everybody agreed that their affidavits might stand and that they would testify to the same effect. Did you not, or is my recollection wrong?

Mr. Works: I don't recall whether there was a direct proffer, but they were here in the courtroom and these gentlemen may cross-examine them now if they desire.

Mr. Angell: Which witnesses?

Mr. Works: If these gentlemen want Mr. Fussell and Mr. FitzPatrick to get on the stand and repeat what they said in their affidavits, they are welcome to it.

Mr. Angell: We do not desire that.

The Court: The affidavits were received in evidence and [606] there was no objection at the time.

Mr. Works: And Mr. Morrow testified upon the basis of those affidavits as to what the facts were.

The Court: Very well. Are we down now to where we can start?

Mr. Fitting: I just want to make sure of one thing. Was Mr. Skelton's last affidavit stricken, your Honor? That was the one filed March 14th or 15th.

Mr. Angell: Was there a ruling on the motion to strike the Berry affidavit?

The Court: Mr. Skelton was here and testified, was he not?

Mr. Gilbert: Yes, he did, your Honor.

Mr. Angell: And he also filed an affidavit of March 14.

The Court: It was subsequent to that date that he testified, was it not?

Mr. Fitting: No, he testified I believe on February 27 or February 28th.

The Court: I think in view of his testimony that the affidavit is merely cumulative.

Mr. Gilbert: I think so too.

The Court: And the affidavit will be stricken in so far as the application for attorney fees is concerned on the ground that it is cumulative and redundant.

Mr. Angell: Was there a ruling on the motion to strike [607] the affidavit of Mr. Berry of March 15, 1950?

The Court: Yes, I ruled on it. I have forgotten how I ruled.

Mr. Gilbert: It was stricken.

Mr. Angell: Thank you.

The Court: Very well. Now do we know what we are going to talk about?

Mr. Works: I think so, your Honor. I have two affidavits here——

The Court: I think we will have a short recess.

(Short recess.)

The Court: Mr. Works.

Mr. Works: Your Honor, if I may resume my famous last words this morning, when all counsel were good-natured they agreed we might file two

supplementary affidavits which do go to the question of attorney fees, namely, showing the time spent by Mr. FitzPatrick and by our office with reference to the Shareholders' Protective Committee or committees, and the allocation which has not heretofore been made in the principal affidavits filed.

The Court: If there is no objection they may be filed.

Mr. Works: Thank you, your Honor.

Mr. Angell: These were just presented to us at the recess, your Honor, although Mr. Bishop was served I believe late last night. This is the first time I have seen them. [608]

May we have time to respond to anything which is in there which we deem necessary to respond to?

Mr. Works: As far as I am concerned, you may.

The Court: Let me see them.

(The documents referred to were passed to the court.)

The Court: This is the affidavit of Paul Fussell and the affidavit of Mr. FitzPatrick.

Do you offer them as witnesses at this time?

Mr. Works: I tender those two gentlemen as witnesses at this time and ask that the affidavits be received in evidence.

The Court: As their direct testimony?

Mr. Works: As their direct testimony; yes, your Honor.

The Court: Any objection?

Mr. Angell: No objection.

The Court: Very well. It is so ordered.

Do you wish to cross-examine them?

Mr. Angell: Yes, I would, your Honor. I have just a couple of questions.

The Court: If you want to look through those you can cross-examine them this afternoon.

Mr. Angell: Thank you, your Honor. If we can reserve it until this afternoon we might save time.

Mr. Works: Now we have another offer on behalf of both applicants with relation to protests from other associations with regard to the San Francisco Bank. [609]

Mr. Gilbert: These were heretofore requested, if your Honor will recall, and we will offer at this time—I think there is no objection to the photostatic copies of the originals which have been supplied to us to the inspection process.

Mr. Bishop: It was agreed, your Honor, that photostats could be introduced in lieu of the originals.

The Court: Legible photostats?

Mr. Gilbert: Yes, they are.

Mr. Bishop: I didn't guarantee them.

Mr. Chapman: They were made by the special master.

Mr. Gilbert: They are legible.

Mr. Bishop: Your Honor, I would make this statement: You only have to read about one of them because they are all substantially the same. There are some slight variances, however.

Mr. Gilbert: I think there are perhaps as many as a dozen which did not use the form.

The Court: These were produced by the San Francisco Bank pursuant to a request for inspection?

Mr. Gilbert: Yes, your Honor.

Mr. Bishop: That is correct.

The Court: And these are the documents produced as to the protests and the reservations of right which counsel for the movants contended were made? [610]

Mr. Bishop: By that limited number; yes, sir.

The Court: Were made on or about the time of the taking over of the Los Angeles Bank and the establishment or creation of the San Francisco Bank.

Mr. Gilbert: There are 79 letters in the ones I handed your Honor, plus the reverse side in a few instances. Some of those letters are duplications. I think there were 34, is that correct?

Mr. FitzPatrick: Approximately.

Mr. Gilbert: Some 34 separate associations. The bulk of the letters follow the form of the resolution and letter which was read at the time that Mr. Skelton was on the stand.

The Court: Very well. These will be received in evidence. It is not necessary for me to read all of them?

Mr. Angell: May we have our objection before they are accepted in evidence?

The Court: Yes.

Mr. Angell: It is our understanding that Mr. Bogardus' affidavit was stricken.

Mr. Bishop: Not the first one.

The Court: Not the first affidavit.

These will be received as movants Wilmington's—how were we numbering those?

Mr. Gilbert: They were numbered by date, your Honor. That is, they have been up to now. [611]

Mr. Bishop: No, he means your next exhibit number.

The Court: The clerk can get the number later.

Mr. Works: May that be a joint exhibit?

The Court: Very well—on behalf of the movants in connection with the application for attorney fees, no matter who it is.

(The documents referred to were received in evidence as Joint Petitioners' Exhibit No. 2-27-50-19.)

Mr. Works: We have no further evidence, your Honor.

Mr. Gilbert: I have no further evidence either.

Mr. Chapman: I would like to call Mr. Noon to the stand.

The Court: Very well.

Mr. Works: This is on the attorneys' fees?

Mr. Chapman: That is right.

Mr. Noon, I think before you go up it might help for you to take one of the books, Volume 300.

The Clerk: You were sworn before, were you not, Mr. Noon?

The Witness: Yes, sir.

FRANK C. NOON

called as a witness, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Chapman:

Q. What is your status with the Federal Home Loan Bank [612] of San Francisco?

A. I am vice president and manager of the Los Angeles Branch.

Q. You have in your hands a book which has been designated in the special master's proceedings as LA-300. Will you tell us what that book is, just generally?

A. The minutes of the meeting of the board of directors of the Federal Home Loan Bank of San Francisco from February 15, 1947, to December 16 and 17, 1950.

Mr. Angell: To what date?

Mr. Bishop: You mean those dates inclusive?

The Witness: February 16 and 17, 1950, inclusive.

The Court: From 1947 to 1950?

The Witness: Yes, from February 15, 1947.

Q. (By Mr. Chapman): Turning to pages 116—I think counsel may want to inspect this. Shall we bring it to the table or do you want to come up here?

(Counsel examining volume.)

Mr. Chapman: I am starting with 116 down to and including 120, the closing of the meeting, and

(Testimony of Frank C. Noon.)

that deals with the meeting of April 22 and 23, 1949.

The Court: Mr. Chapman, counsel are examining the book there. Do you intend to interrogate the witness concerning other matters which counsel would have the right to examine [613] before you talk to him?

Mr. Chapman: I do, but I am going to have to take it one step at a time and it may be necessary for him to identify paragraph by paragraph unless they are willing to concede the genuineness of the book.

The Court: I see it is a quarter of 12:00 here, and if you could just designate now and then counsel during the noon recess could read all of the different things that you expect to examine the witness about so they would be prepared to proffer their objections, if they have any.

Mr. Chapman: I am not certain that I can undertake that. I can give them a list of some. But one leads to another, and if certain things go in I may not need to go any further. If others do, I may have to go on from there.

The Court: My point is that if you can give them a list of the things that you contemplate that you might touch upon, then they can read them.

Mr. Chapman: I can do that.

Mr. Dusenbery: The first designation is quite extensive. It covers several pages.

The Court: Just read them off now and one of

(Testimony of Frank C. Noon.)

you can take it down in pencil. They are all in that book, are they not?

Mr. Chapman: No, your Honor. Some are in the various exhibits books. This is the minute book and this refers to [614] exhibit books at various places.

The Court: Very well.

Mr. Chapman: In the minute book, which is LA-300, pages 165 and those adjacent thereto, dealing with the approval by the directors of the expenses of the acting president.

Then in LA-96, which is one of the exhibit books——

The Court: That is here in the courtroom?

Mr. Chapman: That is here in the courtroom.

The Court: Will you identify it now, Mr. Noon?

Mr. Angell: Have those minute books a number other than the special master's hearing number?

Mr. Chapman: No, but they have the special master's number on the flyleaf.

I would like the record to show that all references that I make to 96 or 300, and so forth, are references to a stamp in the flyleaf of the book which reads: "Mallonee v. Fahey, 5421-PH, Exhibit LA-96 for identification, Ronald Walker, Special Master."

The Court: In other words, those numbers are the numbers assigned in the discovery proceedings.

Mr. Bishop: This same book, your Honor, for the clarification of the record, has heretofore been marked right in the trial of this case, in this court-

(Testimony of Frank C. Noon.)

room, in 5421-PH, as Exhibit G-3 for the respondents on September 16, 1948.

Mr. Dusenbery: May it please the court, in making the [615] designations it would be helpful to counsel, and I think later in introducing them, if Mr. Chapman would be specific as to the pages or the portions of the pages that he wants to offer.

The Court: He is trying to be. That is what I asked him to do. What pages in this book?

Mr. Chapman: Page 896. Let me turn to the page and I will try to give you the heading. Or was it your Honor's intention to have the witness identify all the books first?

The Court: No. My purpose is to give counsel an opportunity through the noon recess to go over them.

Mr. Chapman: Page 896, which is a certified copy of a resolution of the Home Loan Bank Board dealing with the budget and approving attorney fees and expenses in the litigation.

Also page 946, which is a proposed budget for the calendar year 1949, and likewise contains items dealing with attorney fees and expenses of the litigation and similar items.

LA-97 is next. Mr. Noon, will you get that?

The Court: What is the number of the minute book you gentlemen have, LA-300?

Mr. Chapman: No, it is not in there.

Page 1083, which contains three mimeographed sheets attached, headed "Proposed Budget for the Calendar Year 1950," which in part also deals with

(Testimony of Frank C. Noon.)

attorney fees and expenses of [616] litigation.

And in LA-300, page 111, headed, "California Litigation," which is continued over to page 112.

Also on page 115, "Attorneys' Trip to Washington, D. C.," is the heading on that, and the date of the meeting is April 22 and 23, 1949.

And 116 I believe I started with on that designation.

There are two others, your Honor, but I will have to check them in the books. I had to conclude my examination Wednesday evening. Even then they stayed over half an hour for me. These books only became available late Tuesday.

The Court: That is all the designations you can make now?

Mr. Chapman: That is right. There will be two or three, just a very few more, after the recess is over when I can have a little more time on some notes that aren't complete here.

Now does your Honor want me to go ahead with page 116 in LA-300 that we started on?

The Court: No. I would like to get some estimate of the time that will be necessary to conclude the hearing here. This is your only witness?

Mr. Chapman: Yes. But the book matters will be somewhat extensive, and I anticipate at least, from four years' experience in the past, that there may be some objections [617] from the San Francisco Bank on some of these matters. In my opinion they go to the heart of the litigation, to the jurisdiction of the court. One of the resolutions here I

(Testimony of Frank C. Noon.)

think is very much in point on that. I would say that I would be at least two hours.

The Court: I guess we will have to work tomorrow then. I have a law and motion calendar Monday and a case set for Tuesday that is entitled to go ahead because they are bringing witnesses from all over the Pacific Ocean.

Mr. Chapman: I rather anticipated that, your Honor, when the continuance was made to a Friday, and they didn't have the material for the subpoena a couple of weeks ago.

The Court: Could you go ahead at 2:00 o'clock?

Mr. Chapman: I would like to ask your Honor to recess until 3:30. This is Good Friday, I know that litigation is important, but I think there are some of us here that feel we have an even more important duty. I do not think I am the only one here.

Mr. Fitting: I would like to join in that request, if the court please.

The Court: Very well. We will recess until 3:30.

Mr. Chapman: And I offer to waive any time today or tomorrow that is available, or whatever your Honor suggests, to make up for that longer recess.

The Court: We may find a way. Recess until 3:30.

(Whereupon, at 11:55 o'clock a.m., a recess was taken until 3:30 o'clock p.m. of the same date.) [618]

April 7, 1950—3:30 o'Clock P.M.

The Court: Proceed.

FRANK C. NOON

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Works: I think it is proper, your Honor, for the record to show that Mr. FitzPatrick and Mr. Fussell have been released as potential witnesses by the other side.

The Court: Is that correct?

Mr. Angell: That is correct, your Honor, for the San Francisco Bank.

The Court: Very well.

Mr. Fitting: I didn't ask them to stay, if the court please.

The Court: Nobody asked them to stay.

Mr. Fitting: I am willing that they be released.

The Court: Do you wish to call them as witnesses?

Mr. Fitting: No, I do not.

The Court: Does anybody else wish to call them as a witness? (No response.) I take it then that they are released.

Have you had an opportunity to examine the documents referred to by Mr. Chapman before lunch?

Mr. Angell: We have, your Honor. [619]

The Court: Very well. Proceed.

Mr. Chapman: I am going to take these one at a time, your Honor, and before I address myself

(Testimony of Frank C. Noon.)

to the offer, which will have several phases, I would like you to read, starting on page 116 with the paragraph marked "California Litigation," those particular pages.

(The volume referred to was passed to the court.)

The Court: These are the minutes of the San Francisco Bank?

Mr. Chapman: That is right.

The Court: It says, "Full discussion was had between the members of the board." What board?

Mr. Chapman: That is the board of directors of the Federal Home Loan Bank of San Francisco.

The Court: Board of directors of the alleged Federal Home Loan Bank.

Mr. Chapman: Purported.

The date of the meeting was April 22 and 23, 1949. Those are very significant dates, as your Honor will recall, in the former attorneys' fees applications.

The Court: To where, to the end of the meeting?

Mr. Chapman: That is right; to the end of the meeting.

The Court: Very well. I have read it. Page 120 is signed B. A. Perham, Chairman, and Irving Bogardus, Acting Secretary. [620]

Mr. Chapman: I wish to offer into evidence pages 116, 117, 118, 119 and 120 of the exhibit designated in the special master's proceedings as LA-300.

(Testimony of Frank C. Noon.)

Before making the offer, shall we have it marked for identification here, or does your Honor wish to go ahead with the special master's designation? I would like to refer to parts of it for the next few moments.

The Court: It should take a number with relation to this hearing, these different pages.

Mr. Chapman: Will you give it a number, Mr. Clerk?

The Clerk: No. 2-27-50-20.

(The pages referred to were marked Joint Petitioners' Exhibit No. 2-27-50-20 for identification.)

Mr. Chapman: That is offered in evidence, your Honor, for several purposes——

The Court: Is there any objection to it?

Mr. Angell: Yes.

Mr. Chapman: I would like to make the purposes clear before you hear the objection.

The Court: Very well.

Mr. Chapman: The question of attorneys' fees is being resisted on the ground of the jurisdiction of the court. As your Honor will recall, in April and May of 1949 there were proceedings, including a stipulation signed by the San Francisco Bank's counsel and counsel for the Home Loan Bank [621] Board, Divers, etc. That stipulation was vacated by your Honor on an application made on behalf of defendants Home Loan Bank Board, and the vacating of that stipulation was joined in by counsel

(Testimony of Frank C. Noon.)

for the San Francisco Bank and its officers and directors.

This resolution proves the knowledge on the part of the board of directors of the San Francisco Bank and the vacating of that stipulation was an official act of the Bank and binding upon the Bank.

In vacating the stipulation there was an agreement made in the form of a letter filed with this court and called the "ultimatum letter," addressed to various counsel by the Assistant to the Attorney General, Mr. Peyton Ford. One of the paragraphs of that letter is set forth in these minutes, the paragraph which provides that all further attorney fees shall be decided by this court in an adversary proceeding. This is that adversary proceeding, and after the filing of the letter and the proceedings shown in these minutes the San Francisco Bank has submitted to the jurisdiction of this court if there were any doubt about the court's jurisdiction, as to the question of the decision of these attorney fees.

The offer is made into evidence generally of course for the entire case, but particularly on the point of attorney fees and jurisdiction.

And I would prefer, if the gentlemen care to be heard, [622] to have you take up your objections now.

The Court: Is this offer joined in by the movants?

Mr. Works: We do, your Honor.

Mr. Gilbert: Yes, your Honor.

(Testimony of Frank C. Noon.)

Mr. Angell: On behalf of the San Francisco Bank I wish to object on the ground it is incompetent, irrelevant and immaterial, doesn't tend to prove or disprove any issue in the matter pending before this court in determining the right to allow interim attorney fees to the applicant-movant; upon the further ground that the minutes show on their face that it is a confidential report of counsel to the board of directors on negotiations for a settlement, which are not admissible for any purpose whatsoever. And on the further ground that any advice given to a client by an attorney is privileged. The only way that you can convey information or advice to a board or directors is through communication to that board of directors and reporting it in the minutes. We claim it is privileged.

We also object on the further ground, as stated, it only is a report on negotiations for a settlement of the litigation, and negotiations for settlement are not admissions in any sense of the word and are not admissible as such, nor to prove or disprove anything.

Nor can they consent to jurisdiction or do they consent to jurisdiction by entering into negotiations. There would [623] be no clearer way to prevent any negotiations for settlement to go on if such were the fact.

Mr. Fitting: We join in that objection, if the court please, and on the further ground that in so far as it purports to relate what the Department of Justice has said, that it is hearsay.

(Testimony of Frank C. Noon.)

Mr. Works: I assume, Mr. Chapman, you are merely offering this document to prove the facts which are therein set forth which can be done even in the case of an offer of compromise, as I understand the law.

Mr. Chapman: That is one of the purposes, Mr. Works, but I don't believe, your Honor, that the mere presence of counsel renders inadmissible any official action of the board of directors. It may be that we are going to have to go paragraph by paragraph through this matter and where counsel are quoted as advising their clients, if they wish to raise the question of privilege to those paragraphs, it may or may not be correct.

But as the objection is now made, it is too broad because it includes matters which clearly are not privileged. Therefore, your Honor would be justified in overruling that objection in its entirety.

If you prefer to take it paragraph by paragraph on the question of privilege, that may be done.

On the question of compromise, an official act of the [624] board of directors in connection with contested litigation does not become inadmissible merely because compromise may be considered as part of the things that they have done. They have authorized by this resolution their president, then alive, Mr. Harold Holmes, to instruct counsel to do certain things. It is obvious from these minutes that counsel did just those things, and that has a binding effect upon that Bank.

(Testimony of Frank C. Noon.)

I think the objection as previously made could well be overruled in its entirety.

The Court: The objection is overruled. Admitted.

(The document referred to was received in evidence as Joint Petitioners' Exhibit No. 2-27-50-20.)

Mr. Chapman: The next designation——

The Court: These had better be marked, Mr. Clerk. Have you photostats of these?

Mr. Chapman: No, there were objections made to the special master making those photostats before your Honor ruled. It was my intention, under those circumstances, to suggest that the clerk of this court make the photostats while the books are here and that the original books, after the photostats were made, could then be returned to the custody from which they were produced.

I would like to point out, however, that we are not through with the books on the question of inspection. Mr. [625] Dusenbery has told me that they would be necessary in the use of the Bank, and I had suggested that after the photostats were made of the copies that go into evidence that the books might well be returned to the Bank if they could come down on the next special master's order with a little less than two or three weeks delay when we ask for them, and I have been assured that that is possible.

I suggest that the clerk make the photostats from

(Testimony of Frank C. Noon.)

the originals here in court. Then there can be no question, as we have had before, of getting them back.

Mr. Bishop has another suggestion which he took up with me a moment ago.

The Court: Not a photostat of the whole book?

Mr. Chapman: No, only what we offer in evidence, your Honor, the three or four pages with that designation.

Mr. Bishop: My suggestion, your Honor, was that after the court had ruled on all the portions of the minute books that he deemed admissible, that we return them to the special master so that all the photostating is done and recorded and kept track of together and nobody can get hurt, because I have acceded to Mr. Chapman's wishes and permitted two microfilms of every one of these books to be taken.

The Court: It seems to me, in view of the fact that I understand the special master has a regular shop where he makes photostats, that that probably would be easier and [626] quicker and better.

Mr. Chapman: Either process, your Honor.

The Court: The clerk will have to stamp these pages, 116, 117, 118, 119 and 120.

Mr. Chapman: Yes, your Honor.

The next is LA-96, page 896. May I have that?

(The volume referred to was passed to counsel.)

(Testimony of Frank C. Noon.)

Mr. Chapman: Do you wish to give this a number, Mr. Stacey?

The Court: Let me look at it first.

(The volume referred to was passed to the court.)

Mr. Chapman: That is a resolution of the Home Loan Bank Board approving certain action with regard to counsel.

The Court: There is no objection other than your general grounds?

Mr. Angell: Just the general objection, your Honor, incompetent, irrelevant and immaterial, doesn't tend to prove or disprove any issue in the case.

The Court: Overruled. Admitted in evidence.

Mr. Works: We join in the offer, your Honor.

Mr. Gilbert: We also join.

The Court: Very well. That will be Exhibit 2-27-50-21.

(The document referred to was received in evidence as Joint Petitioners' Exhibit No. 2-27-50-21.)

The Court: And there will be the same provision as to [627] the photostating.

Mr. Chapman: Yes, your Honor.

The next, your Honor, is on page 946. It is a proposed budget for the calendar year 1949.

(The document referred to was passed to the court.)

(Testimony of Frank C. Noon.)

The Court: I do not think this book has been identified by the witness yet.

What is it?

The Witness: May I see it?

(The document referred to was passed to the witness.)

Mr. Bishop: I would suggest, in the expedition of time, that we are willing to stipulate that these are the official books of our Bank. We don't have to have the witness identify each one.

The Court: I had the understanding somehow or other that the minute books are not complete minute books, that the minute books refer in turn to other books wherein certain files are kept, and that this is one of them.

Mr. Chapman: That is correct. This is an exhibit book.

Mr. Bishop: That is an exhibit book.

The Court: An exhibit book to the minute book, is that correct, Mr. Noon?

The Witness: Yes, your Honor.

The Court: Very well.

Mr. Westover: May we have the number of it, the special [628] master's number, so that we can refer to the preceding list?

The Court: It is LA-96. This is page 946.

The material portion here is the counsel fees and the expenses?

Mr. Chapman: I think the entire budget, your Honor, because it shows the proportion that those

(Testimony of Frank C. Noon.)

litigation expenses bear to the entire budget. That is why I offer the whole three pages.

Mr. Works: I assume, Mr. Chapman, you are not offering any of these figures to show the reasonable value of the services rendered by counsel for the Bank?

Mr. Chapman: On the contrary, I think that they are unreasonably low if counsel were representing clients from whom property had been seized. Probably the recipients of the seized property would take a different rate.

Mr. Angell: That is one of the reasons why we are unable to see the relevancy of this, your Honor.

The Court: What is the relevancy?

Mr. Chapman: They are using the seized assets to pay themselves while they are trying to deny to the people from whom they seized the assets the same right. It is exactly the same situation we had with our Shareholders' Committee that went to the United States Supreme Court.

The Court: I understand. Very well. [629]

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-22 for identification.)

The Court: Do you object?

Mr. Angell: I do. On the same grounds, incompetent, irrelevant and immaterial.

The Court: Overruled. Admitted. No. 22.

(The document referred to was received in evidence as Petitioners' Exhibit No. 2-27-50-22.)

(Testimony of Frank C. Noon.)

Mr. Fitting: We join in that objection, your Honor.

The Court: It is admitted for the limited purpose specified by Mr. Chapman.

Is that your view? Is that your offer too?

Mr. Works: Yes, that is our understanding because if they were offered to show reasonable value we would object to them as being immaterial.

The Court: In other words, they are offered only to show that the San Francisco Bank is using the funds which are contended to be the funds of the Los Angeles Bank and a portion of which are admitted to be the funds of the Long Beach Association, not as much as contended but for the purpose of payment for attorney fees.

Mr. Angell: If that is the purpose of the offer, I would like to add another objection, that they do not tend to prove or disprove that at all, because the funds are not identified. What has been referred to as a seizure of the [630] assets of the Los Angeles Bank was a dissolution of the Los Angeles Bank under the orders of the Home Loan Bank Board Commissioner provided for by law and was not a seizure. The assets were transferred to a legal entity authorized by the Federal Home Loan Bank Act, and there was no seizure. The assets became identified with and a part of and intermingled with the assets of the Portland Federal Home Loan Bank, and there is nothing that shows in these records that are being introduced here that any part of that money that is shown

(Testimony of Frank C. Noon.)

there as being appropriated for the purposes of the budget is any part of the assets or moneys of the Los Angeles Bank or the Long Beach Association.

The Court: The objections are overruled.

Mr. Fitting: May the record show that we join in these objections that Mr. Angell makes?

The Court: Very well.

Mr. Angell: If we could have a stipulation that our objection goes to all of these documents being offered, we might save time.

The Court: It may be deemed that you have made the objections whether there is a stipulation or not.

Mr. Works: May it also be deemed, your Honor, that the movants join in these series of offers unless they specify to the contrary?

The Court: I think you had better make your record [631] specific on that.

Mr. Works: Very well.

Mr. Chapman: This is special master's No. LA-97. Perhaps the clerk will give it a new number for identification here. And it is page 1083.

The Court: I will mark it. The last number was 22, was it, Mr. Clerk?

The Clerk: Yes, sir.

The Court: This will be 2-27-50-23.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-23 for identification.)

(Testimony of Frank C. Noon.)

Mr. Bishop: The same ruling on 22 as to photographing and all of them unless specified to the contrary?

The Court: That is right.

You join in this offer? This is a budget, and for the same limited purpose?

Mr. Chapman: That is correct.

Mr. Works: We join in that.

Mr. Gilbert: Wilmington also joins, your Honor.

The Court: Very well. Admitted.

(The document referred to was received in evidence as Joint Petitioners' Exhibit No. 2-27-50-23.)

The Court: LA-97 is an exhibit book to the minute book?

The Witness: Yes, your Honor. May I glance at it?

(The volume referred to was passed to the witness.) [632]

Mr Chapman: I offer at this time special master's LA-300 and——

The Witness: Yes, this LA-97 is an exhibit book to the minute book.

Mr. Chapman: I am offering page 163 only, the paragraph which says "Proposed Budget for Calendar Year 1950," together with the open part of the reading.

The Court: Page 163?

Mr. Chapman: That is right.

(Testimony of Frank C. Noon.)

(The volume referred to was passed to the court.)

The Court: That is that short paragraph?

Mr. Chapman: That is right, your Honor.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-24 for identification.)

Mr. Works: The Los Angeles Bank joins in that, your Honor.

Mr. Bishop: What is it?

Mr. Chapman: A resolution of the board of directors adopting the budget that we just put in.

Mr. Gilbert: Wilmington also joins in the offer, your Honor.

Mr. Works: The Los Angeles Bank does also.

The Court: Very well. Same objection. Same ruling. This will be No. 24, Mr. Clerk. [633]

(The document referred to was received in evidence as Joint Petitioners' Exhibit No. 2-27-50-24.)

Mr. Chapman: This is special master's LA-300, pages 111 and 112, starting with the words "California Litigation."

(The volume referred to was passed to the court.)

Mr. Works: The Los Angeles Bank joins in the offer.

(Testimony of Frank C. Noon.)

The Court: That is the minutes of March 29 and 30, 1949?

Mr. Chapman: Yes.

Mr. Gilbert: Wilmington also joins, your Honor.

The Court: Very well. Do you mean all the rest of the minutes or just——

Mr. Chapman: Just that to the end of the meeting, "California Litigation" to the conclusion of the meeting.

The Court: Of that day?

Mr. Chapman: Of that day.

The Court: Let me understand you. The meeting recessed at 5:00 p.m. Do you mean to there or to the end of the meeting over here?

Mr. Chapman (Examining volume): Where the meeting recessed, your Honor.

The Court: Same objection. Same ruling. Admitted. No. 25.

(The document referred to was received in evidence as Joint Petitioners' Exhibit No. 2-27-50-25.) [634]

The Court: I suppose you ought to have the other page also for the date.

Mr. Chapman: I think we should have the opening page and the closing page. In other words, the certificate of the meeting and who was present and where it was held.

The Court: That will be pages 110, 111, 112 and 114, Mr. Clerk.

The Clerk: Yes, your Honor.

(Testimony of Frank C. Noon.)

Mr. Chapman: Then on page 115 of the same book, headed "Attorney Fees."

The Court: That is the minutes of April 22-23, 1949?

Mr. Chapman: That is right. Part of those were offered as another portion but this is still another part.

Mr. Works: Los Angeles Bank joins, your Honor.

Mr. Gilbert: Also Wilmington.

The Court: Same objection. Same ruling. No. 26.

(The document referred to was received in evidence as Joint Petitioners' Exhibit No. 2-27-50-26.)

Mr. Chapman: Special master's LA-98. I don't know that Mr. Noon has identified this. This is another one of the minute books.

Mr. Angell: We haven't seen these, your Honor.

Mr. Chapman: This one Mr. Bishop gave us a copy of at the special master's hearing.

Mr. Gilbert: Is that the budget or the [635] total expenditures?

Mr. Bishop: Total expenditures.

Q. (By Mr. Chapman): Will you identify that book for us, Mr. Noon?

A. This is another exhibit book to the minutes.

Mr. Chapman: That page was 1140. This, your Honor, is a little different situation. I will wait until you read it and then discuss it.

(Testimony of Frank C. Noon.)

(The volume referred to was passed to the court.)

The Court: Page 1140 of LA-98 will be No. 27.

The Clerk: Yes, your Honor.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-27 for identification.)

Mr. Chapman: LA-95-A. May I have that, Mr. Noon?

(The volume referred to was passed to counsel.)

The Court: Page 1140 is in as No. 27. Same objection and same ruling.

(The document referred to was received in evidence as Joint Petitioners' Exhibit No. 2-27-50-27.)

Mr. Gilbert: Has the last offer been accepted?

The Court: Yes.

Mr. Gilbert: We join in it.

Mr. Works: We also join.

I understood Mr. Chapman was going to state his purpose. That is why I waited a moment, your Honor. [636]

The Court: I understand the general purpose of all of these is the same.

Mr. Chapman: Exactly, your Honor. It is certainly not as to the reasonableness of the fees.

The Court: I could not see any other ground for admitting them.

(Testimony of Frank C. Noon.)

Q. (By Mr. Chapman): Mr. Noon, you have before you special master's Exhibit LA-95-A, book, the word "book" being part of the exhibit because of a duplication of numbers. Can you identify that?

A. That is another exhibit book to the minutes.

Mr. Chapman: Now these I don't think I listed to you gentlemen before lunch, but they are the approval of the various budgets that we have put into evidence from the Board. It is the Home Loan Bank Board's approval of the budgets. This is page 716.

(The volume referred to was passed to the court.)

The Court: Page 716 of LA-95-A is No. 28.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-28 for identification.)

Mr. Works: The Los Angeles Bank joins in that.

Mr. Gilbert: Wilmington also joins.

The Court: Very well. Same objection. Same ruling. Admitted. [637]

(The document referred to was received in evidence as Joint Petitioners' Exhibit No. 2-27-50-28.)

Mr. Chapman: LA-96, page 867, another approval of a budget by the Home Loan Bank. I think I had better take these one at a time, your Honor.

Mr. Angell: While you have that book, Mr. Chapman, you might save time by looking at pages

(Testimony of Frank C. Noon.)

522 and 963 because that is where the budgets were raised.

Mr. Works: The Los Angeles Bank joins as to any and all offers with reference to this volume.

Mr. Gilbert: Wilmington joins in that also.

The Court: LA-96, page 867 will be No. 29.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-29 for identification.)

Mr. Chapman: Will your Honor turn to page 922 also?

The Court: And 964, Mr. Angell said.

Mr. Angell: No, 922.

The Clerk: Page 867 is No. 29?

The Court: Page 867 is No. 29.

Page 964 has something about a budget, too.

Mr. Chapman: Let's take them in order. Page 922 was the next one.

The Court: Page 922 will be 30.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-30 for identification.) [638]

Mr. Chapman: Then Mr. Angell suggested 522—was it 522 or 922?

Mr. Angell: 922.

The Court: And 964.

Mr. Angell: 963 or 964. It is a blanket authorization.

(Testimony of Frank C. Noon.)

The Court: 963 and 964 both relate to a budget. Maybe you might want to look at them both.

(The volume referred to was passed to counsel.)

Mr. Bishop: 963 and 964 both?

The Court: Do you offer them both?

Mr. Chapman: I do.

The Court: On behalf of the movants?

Mr. Chapman: Yes.

The Court: Let us number them.

The Clerk: Nos. 31 and 32.

(The documents referred to were marked Joint Petitioners' Exhibits Nos. 2-27-50-31 and 2-27-50-32 respectively for identification.)

The Court: Same objection. Same ruling. Admitted.

(The documents referred to were received in evidence as Joint Petitioners' Exhibits Nos. 2-27-50-29, 2-27-50-30, 2-27-50-31 and 2-27-50-32.)

Mr. Angell: And 175 ties in with the previous one offered by you in LA-97 and 1083.

Mr. Chapman: I don't know that I am interested in that one. [639]

Mr. Angell: While there is a lull, may we offer it, as an explanation of 1083 which is already in?

The Court: Let me look at it.

Mr. Angell: It is LA-300 at page 175.

(Testimony of Frank C. Noon.)

(The volume referred to was passed to the court.)

The Court: That is the meeting of December 16 and 17, 1949, under the heading "Appointment of Counsel for California Litigation"?

Mr. Angell: That is correct, your Honor.

The Court: There are two headings.

Mr. Angell: Pardon me.

Mr. Chapman: I think there is also a reference to cost on appeal. Are you interested in that one?

Mr. Works: We join in the current offer no matter whom it is made by.

Mr. Angell: Page 175, appointment of counsel under the title of "Appointment of Counsel for California Litigation."

The Court: And not the other one?

Mr. Westover: May we have the date?

The Court: December 16 and 17, 1949.

Mr. Angell: December 16-17, 1949. Did you read this, your Honor?

(The volume referred to was passed to the court.)

The Court: This will be a letter, Mr. Clerk. What is the next letter? [640]

The Clerk: 2-27-50-F.

The Court: It will be admitted as Exhibit F, that is, page 175.

Mr. Chapman: May I be clear on whose offer that is?

(Testimony of Frank C. Noon.)

The Court: That is the offer of the San Francisco Bank and it takes a defendants' number or letter.

Mr. Angell: In rebuttal to the offer of Volume LA-97, page 1083, or in explanation of it.

(The letter referred to was marked Defendant San Francisco Bank's and Official Defendants' Exhibit No. 2-27-50-F for identification.)

Mr. Chapman: Does anybody else join in that or is that only offered by the San Francisco Bank?

Mr. Works: I joined in it.

Mr. Chapman: I want to be clear on this.

Mr. Gilbert: I would like to join in it also.

The Court: It is admitted.

(The letter referred to was received in evidence as San Francisco Bank's and Official Defendants' Exhibit No. 2-27-50-F.)

Mr. Chapman: I am now offering, your Honor, the rest of the book into evidence.

The Court: The rest of the book?

Mr. Chapman: That is right. It has been offered in evidence by the other side and it is their own books. I don't see any reason why the balance, which explains the [641] entire situation, shouldn't go into evidence.

Mr. Angell: We make the same objection.

Mr. Fitting: I object to it on the obvious grounds that it is incompetent, irrelevant and immaterial.

(Testimony of Frank C. Noon.)

Mr. Chapman: It is their own offer of their own books.

Mr. Angell: We have not read the book, your Honor. I don't know that there is anything in there that we particularly care that the court did not see. It is a public record, of course.

The Court: I see here "California Litigation," but I cannot see any need for offering the whole book in evidence.

Mr. Chapman: Your Honor, the matters to which they refer there are referred to in repeated instances and once they offer into evidence any part of the book the privilege is gone.

Mr. Angell: You disclose the most startling rules of evidence I ever heard, that by offering one resolution you therefore swallowed a whole book, but that may be a rule.

But, your Honor, this record is already slightly encumbered, and while we would like to make Mr. Chapman happy, I can't see that the minutes or minute book, whatever that happens to be, has to do with this.

The Court: I do not think the whole book should go in evidence by any means. There are just countless things that are discussed in here, and while no doubt, in glancing through [642] it I can see occasional references to California Litigation, and that may have some bearing or materiality on the matter that is now immediately before the court, but I do not see any necessity for offering all of it.

Mr. Chapman: Your Honor, I am very serious in that offer, and I would like to have the book

(Testimony of Frank C. Noon.)

marked for identification if your Honor would look at the balance.

The Court: There is no reason why the book should not be marked for identification.

Mr. Chapman: And I would like to have it all copied so it can be made ready on appeal.

The Court: You have a microfilm of this?

Mr. Chapman: No, I haven't. One has been made but so far I haven't been able to get near it.

The Court: Where is it?

Mr. Chapman: The special master has it, and Mr. Bishop says nobody can have it until you rule on it.

Mr. Works: May the record show that the Los Angeles Bank does not join in the offer of the entire volume.

The Court: You can have the whole book marked for identification but it is already marked for identification as Exhibit A-1, but that was way back in 1948.

Mr. Bishop: That was before it had so many pages in it.

The Court: Is the book complete now?

Mr. Bishop: No. [643]

Mr. Angell: I believe that is the current book.

Mr. Bishop: That is the current book. It grows.

The Court: It can be marked for identification in connection with this hearing, Mr. Clerk.

Mr. Chapman: Your Honor, what means will we have available of excluding a piece of evidence to present that in case it should become necessary on

(Testimony of Frank C. Noon.)

the appeal? Would you order the microfilm released?

The Court: I do not know. I will not cross that bridge until I come to it.

Mr. Chapman: Then I will have to withdraw my offer to permit the book to be withdrawn. If it is marked for identification I believe it has to become part of the record so that if there is the necessity to review that ruling there is something to be presented to the appellate court. I am trying to make their books available to them but in that case we will ask that a microfilm be kept here, or something of that nature.

Mr. Bishop: I will have to call your Honor's attention to previous rulings made by this court about the minute books. On the date that is shown in the front of that book, when that book was originally here, your Honor was very mindful of the situation in relation to the disclosure of matters pertaining to individual association's interests, and your Honor stated that not only in the public interest but in the [644] interest of the particular individual association he was not going to permit the photostating in the entirety of that very minute book, and we believe that that decision and ruling was proper.

There are matters in that minute book of vital concern to individual associations but that have no concern to this litigation.

Mr. Chapman: I think, your Honor, that counsel offering the evidence has some right to be heard

(Testimony of Frank C. Noon.)

on the question of whether we are concerned in the litigation. I would like to direct your Honor's attention to a ruling of yours later than 1948.

The Court: For instance, what is the difference about a retirement fund? I notice such a heading. And the trustee of the retirement fund?

Mr. Chapman: Some parts of it may not be material, your Honor, at the present moment but I would not like to predict whether they would or would not be later.

I would like to put into the record, your Honor, your order of inspection of February 7, 1950.

The Court: I will take judicial notice of the files and records in this proceeding without putting it into the record again. It is in there once.

Mr. Chapman: It says on line 11, page 7, paragraph 8:

"The documents and files which are [645] inspected or examined or portions thereof shall be photostated at the request of any party which has designated such document or file for inspection."

Now we have not had a photostat of it. There is a microfilm extant. I understand your Honor either has or is about to exclude part of it and——

The Court: No, I am not excluding part of it. I am just saying that the entire book, a lot of it is wholly immaterial.

Mr. Chapman: I think as to portions of it your Honor is correct, but I am not prepared at this moment to say which portions, and they have offered part of it which opens up the rest of it to our offer

(Testimony of Frank C. Noon.)

in evidence. I want something for the record if the original book is to leave the court, as I said, in case we are up in the Circuit again on this matter.

Mr. Fitting: If the court please, I would suggest that Mr. Chapman indicate page by page what is material.

Mr. Bishop: I think it is his duty to assist the court to that extent.

Mr. Chapman: I am willing to do that if I can have the book long enough to do it. I saw it for the first time last Tuesday after asking for it a long time ago.

The Court: How long would it take you to look at this book?

Mr. Chapman: If your Honor would give me until the [646] close of the argument—I understand we are going to be here tomorrow and I don't expect to do a lot of the argument—I will try to go through it.

The Court: I think we skipped your offer in evidence, or did I admit it as F?

Mr. Chapman: You did.

Mr. Angell: That is admitted as F.

The Court: Page 175?

Mr. Angell: Yes.

Mr. Bishop: Your Honor, it was also part of your ruling in relation to other matters in the minute book relating to other associations that it was even limited to counsel for examination.

Mr. Chapman: I have no objection if the book is sealed or the copies remaining sealed in the files

(Testimony of Frank C. Noon.)

of the court, but I would like it available in case there is an appeal.

Mr. Bishop: We have given Mr. Chapman and Mr. Westover full access and opportunity all this week to read that book and they have all perused that book pretty thoroughly. I particularly mention that at this time because I believe it is evidence of our good faith that we have tried in every way possible to comply with that subpoena that produced those records.

Mr. Westover: Mr. Bishop, I will have to challenge that. I am sorry. That particular book I have never seen. [647]

Mr. Bishop: That will be your fault, Mr. Westover, not anybody else's.

Mr. Westover: May I finish the statement?

Mr. Bishop said I had all week to peruse it. I did not. It was brought out and it was asked that it be passed around the table. I waited my turn to see it and before it got to me they put it back in the vault. I have not seen the book to go through it whatsoever. We stayed there until 5:00 o'clock. I did go through the minute books, the other documents, but the minute books I was to be allowed to see at some later time.

The Court: Have you all the things in these exhibit books that you want marked up to now, Mr. Chapman?

Mr. Chapman: No, your Honor, I have not.

The Court: Let us get along with those and get

(Testimony of Frank C. Noon.)

that done and then I will give you a chance to look at the minute book.

Mr. Westover: I would like to be afforded the opportunity to go through the minute book at some stage of these proceedings.

The Court: I will make an appropriate order on it.

Mr. Westover: Thank you.

The Court: To protect the confidences involved.

Mr. Angell: I want to say that just because counsel for San Francisco Bank sit by and say nothing, we do not admit that the books have not been made available to them. It may [648] be that they didn't have time or they haven't been able to, that I don't know, but I don't want this record to show that any attempt has been made by the San Francisco Bank or its counsel not to give access to these books when they were available for that purpose.

Mr. Chapman: The special master's records will show when those books first became available, and that was on noon Tuesday——

The Court: Let us not get into a picayunish row here about whether you did or did not see them. Let us get on with the evidence. What do you want to put in evidence next?

Mr. Chapman: I have already offered all of this book but there is another portion of it that I am going to offer specifically.

The Court: I will not sustain the objection to the offer because in making the objection it is made

(Testimony of Frank C. Noon.)

on grounds that if I sustained them I would be deciding the merits of the litigation. But I will of my own motion refuse your offer in evidence on the ground that it appears upon a superficial examination of the book that there are many things in it that are wholly immaterial to the matter now before the court.

Mr. Chapman: On page 185, under heading of "California Litigation." And this has not been directed to your attention before. I have the minute book LA-300. [649]

(The volume referred to was passed to the court.)

Mr. Chapman: I understand other counsel haven't seen this particular matter either.

Mr. Angell: Your Honor please, in the interest of saving the time of the court, I am wondering if we adjourn now and allow Mr. Westover and Mr. Chapman and other counsel, if they want to go through these and find out what they want.

The Court: It seems to me that that time could well be used other than taking up the time of the court.

Mr. Angell: We would be willing to stay here so that they can get what they want.

The Court: It seems to me if you would go through and pick out the pages serially, book so-and-so, pages so-and-so——

Mr. Angell: It will save a lot of time and make for a more orderly procedure, because matters are

(Testimony of Frank C. Noon.)

coming in without regard to chronology or dates or anything like that.

Mr. Chapman: The reason for that is to trace through and put in the budget, the adoption of the budget and the approval by the Home Loan Bank Board. That is why it does not come in chronological order, because those acts were not chronological.

Q. Mr. Noon, there were some other matters besides the books, a number of vouchers, cancelled checks and those matters. Are they here? [650]

A. Yes.

The Court: Are you finished with the books?

Mr. Chapman: No, I am not. I thought your Honor wanted us to go through the minute book again.

The Court: Is it the minute book only or the exhibit books?

Mr. Chapman: The two are interlocking.

The Court: In other words, the minute book is a part of the exhibit books?

Mr. Chapman: That is right. Exactly.

Mr. Westover: That is what I am attempting to do, what you suggested, but I have never seen the books before although I have heard them referred to in other places.

The Court: Now what are these?

Mr. Chapman: Vouchers and expense accounts in connection with the litigation.

The Court: Is there any reason why they should be proffered? You have already indicated by the reports of the Board the payment of the fees and

(Testimony of Frank C. Noon.)

expenses and the authorization. Is this not just cumulative?

Mr. Chapman: We have run adding machine slips and there are some \$70,000-odd approximately of directors' traveling expenses, directors' fees and other matters above the figures we have already put in. I think you are perhaps right that it is merely cumulative. [651]

There is one particular item, however, that I want to put in but not the whole bulk of it. That item has a number.

The Court: Have you seen these, Mr. Works or Mr. Gilbert?

Mr. Works: No, I haven't.

Mr. Gilbert: I havent seen the vouchers themselves. They were being inspected by others all week. I am familiar with it generally.

Mr. Bishop: Your Honor, I wish to state, for a limited purpose only that each and all these boxes contain statements, vouchers, and everything in accordance with the demand contained in the subpoena so far as we were able to produce to date, that this material has been coming in from day to day, and some of it has been available for examination since early last week, and every one of them has been given a number and microfilmed before the special master, and each one of these vouchers has been gone over by Mr. Chapman and adding machine tapes run, some of other counsel have looked at it all they wanted to, but I wanted your Honor to know that there are boxes of them full

(Testimony of Frank C. Noon.)

and we would like to keep them in the same order because they were pulled from the files for each month.

The Court: I understand.

Mr. Bishop: And it has entailed a great deal of work, hours of work, and Mr. Chapman has just now asked for one of the last parcels that came in, Parcel 7. I think he wants [652] some statement out of there.

Mr. Angell: Just to clear the record, Mr. Chapman says that there is about \$70,000——

The Court: In addition to that authorized by the Board, I understand, according to the minutes already put in.

Mr. Chapman: That is right.

Mr. Angell: We do not agree with that statement simply because we don't know. We don't want the statement of Mr. Chapman to be taken as a fact.

The Court: In other words, you have not run the vouchers yourself?

Mr. Angell: We have not run the vouchers ourselves. I have never seen them.

Mr. Chapman: There was an adding machine tape made on them.

Mr. Angell: I would have to go and find out that budget item by item and look at the amounts.

Mr. Chapman: I can't look at records and argue at the same time. The material was presented in the form that you see it, in installments. We did have adding machine tapes run. Mr. Bishop per-

(Testimony of Frank C. Noon.)

mitted us to do that as part of the inspection. The lump of this material has to do with expenses, not with attorney fees, but expenses, traveling expenses of the directors, and directors' fees on the meetings.

There are, however, one or two particular items, and in [653] this mass of material it is not easy to locate them instantly. I think in 5 or 10 minutes I can do so.

The Court: What do they relate to?

Mr. Chapman: One of them is Chairman Perham's traveling expenses being questioned by the secretary of the Bank, a dispute over that matter which apparently was finally settled and rectified. But it went into considerable detail of what was proper or improper traveling expenses for the San Francisco Bank, and how they were computed. It bears on the litigation in that respect.

The Court: How does it bear on attorney fees?

Mr. Chapman: In that the meetings of the directors have all been out of the state of California since the directors became defendants, as disclosed by the minute books, all of which I have offered in evidence.

The Court: If that is disclosed by the minute books, what probative force do these have?

Mr. Chapman: It indicates the expenses of liti-

(Testimony of Frank C. Noon.)

gation in keeping the directors out of California, the home office of the Bank, so they could not be served within the state. In other words, the expenses of avoiding the jurisdiction of the court.

Mr. Angell: We object to that view, your Honor.

The Court: I cannot see how that would have any effect upon the result which is sought by the movants here, or [654] objected to by the defendants and respondents, in so far as attorney fees are concerned.

Mr. Works: I am going to object to that, too, as immaterial and irrelevant.

The Court: I do not think it is material or relevant.

Mr. Chapman: All right. In that case we close the situation with the right of going through the exhibit books and the minute books.

The Court: Very well. It is 15 minutes of 5:00 now. What do you want to do, examine them until, say 7:00 or 7:30 and come back this evening and see if we can finish this hearing tonight?

Mr. Chapman: I see no reason, your Honor, why the argument could not proceed. The only thing that would be, as you say it would be cumulative, more of the same on the budgets.

The Court: I do not know. How is anybody going to argue until he knows everything that is in evidence? How am I going to relate the argument until I know what is in evidence? Here we have now taken this afternoon, in fact we have taken all day,

(Testimony of Frank C. Noon.)

and have actually made very little progress in so far as reducing anything to evidence is concerned. I do not want to hold court on Easter Sunday.

Mr. Chapman: I hope we haven't made that necessary, your Honor, nor anywhere near approaching that.

May I make this suggestion? Rather than attempt to go [655] through some 800 pages of minute books——

The Court: It does not take long to go through minute books. Anybody who is experienced in reading, as you are, does not need that time.

Mr. Chapman: I appreciate your Honor's compliment, but in a case this complicated I don't believe a casual glance will do it. I am primarily interested in having offered the entire minute book into evidence in preserving it available for a record on appeal if that becomes necessary. Now the parts of it that are pertinent to take that page by page isn't an hour or an hour and a half's task. I understand that you are ruling parts of it are immaterial. I do not contend by that, that that need be made available for public inspection, as Mr. Bishop and the other gentlemen seem to object to, but I do think when they offer part of the book in evidence that the entire book becomes admissible on our part. I am firm in that position, and right or wrong it is a position I want to urge if there is an appeal.

The Court: I think you are right as to the material portions but not as to everything in that book. The Witness testified that these exhibit books

(Testimony of Frank C. Noon.)

are part of the minute books. What do they do, fill a cabinet drawer there with books? There certainly must be something in there that is material if anything is material.

Mr. Chapman: Yes, there [656] unquestionably is.

The Court: And it seems to me that that can be found out in sitting down and in two or three hours looking at those books.

Mr. Chapman: I am willing to undertake it in whatever time your Honor allows, but I would like to point out on the inspection matters that these books came in and were available to us at noon on Tuesday, Tuesday and Wednesday were the only hearing days before the special master, and that there are four counsel to examine them, and of necessity we have had to split it up and one counsel take one group and other counsel another group. I had a total of about an hour and a half to work on the 800 pages. They were courteous enough to stay from 4:30, their regular closing time, until 5:00 o'clock to give me that last half hour on these matters. Now that is the only time I have had on these since they were down here two years ago. If your Honor thinks I should try to find what is material in another two hours, I will try and do it.

The Court: I take it that after this is finished that there will be no further evidence?

Mr. Chapman: Not on our part.

The Court: Is that correct?

Mr. Works: That is correct.

(Testimony of Frank C. Noon.)

The Court: Then it will be a matter of argument only.

Mr. Westover: Your Honor please, I have a matter that I will want to offer into evidence when it is appropriate. [657]

The Court: Books?

Mr. Westover: A portion of a book.

Mr. Chapman: Is there any chance of you doing that while I go over here in a corner and read this?

Mr. Westover: It will only take a few moments to do it. I have only one matter.

Mr. Chapman: Can't we proceed with that?

The Court: Have these people seen that book?

Mr. Westover: No, I just found it now again myself.

Mr. Angell: I am wondering, your Honor—it is 10 minutes to 5:00—we will read this in and then find something else. I am wondering if we couldn't take an adjournment now and we would be willing to stay on here tomorrow so that it can be put in in an orderly fashion in the morning and then conclude the argument tomorrow. I think some of us are pretty weary. We have been working pretty late for a long time. I personally would like to go on tomorrow rather than tonight, if it is agreeable to the court and other counsel.

The Court: I would like to do that too, counsel, but——

Mr. Angell: Or Monday.

The Court: I have other law and motion matters on Monday.

(Testimony of Frank C. Noon.)

Mr. Westover: Your Honor please, I might state that there was an item I asked Mr. Bishop to have in court the other morning and he didn't happen to have it here, but he did [658] let me see the book at the office subsequently, and I had an opportunity to see it just now. So it is not something that was just found.

Mr. Angell: I thought there might be other things that you might want.

Mr. Westover: There might be, I don't know, but this particular one was not just found.

Mr. Works: Your Honor, I am rather struck with Mr. Angell's suggestion. I know my argument isn't going to take much more than 30 or 45 minutes. These gentlemen can stay here and hunt through the records to their hearts' content as far as I am concerned.

(Addressing Mr. Gilbert) Do you feel that way?

Mr. Gilbert: Yes, I do. If we take it up in the morning we will probably be in a position to go right ahead with the argument at that time.

Mr. Angell: I just thought we would save a great deal of the court's time.

The Court: I do not think there is any necessity of taking everybody's time here while counsel have to look through the books and find the things that he deems material. I do not see why it cannot be done when the court is not in session. But at the same time it is difficult to make any rapid progress in this case. We spent an hour and 15 minutes this morning before we got down at all to the matter

(Testimony of Frank C. Noon.)

that [659] everybody came here for, and I am afraid if I recess now until tomorrow morning we will still be here tomorrow night. In any event, I would like to have this matter finished, as far as the court is concerned, by tomorrow noon under all circumstances.

Now this is a very slow process. There is no reason why you cannot offer, if you have time to find it, pages so-and-so of book so-and-so and it will not take me long to glance at them.

Mr. Chapman: I made every effort to have these books available. I subpoenaed them three weeks before the hearing and I just got them two days ago.

The Court: I will tell you what I will do. I will recess now, and suppose you stay here until 6:00 o'clock and see what progress you can make in looking through the books, and if it looks like you have completed the things you want to find by that time we will come back here and complete it; if not, why then we will recess until tomorrow morning.

Mr. Chapman: I think that is an excellent suggestion.

The Court: But if I cannot finish this today or tomorrow I have no idea when I can resume it again. My first open date is September.

Mr. Works: Is it your Honor's thought to let counsel make their examination and conclude the taking of evidence tonight and then have the argument tomorrow? [660]

The Court: That is right.

(Testimony of Frank C. Noon.)

Mr. Works: That is all right with me.

The Court: And I think anybody who might have an objection, even though you say you do not, you should be here. You may want to object to it yourself.

Mr. Chapman: If I am only to have until 6:00 o'clock I would like to start as soon as I can.

The Court: If you will do that, and if you are going to take the lead on this, why you can go to work on the books now. So we will recess until 6:00 o'clock.

(At this point a recess was taken.)

The Court: I understand from Mr. Stacey that you have concluded your examination of the books, Mr. Chapman:

Mr. Chapman: The best I could with the time I had, your Honor, without delaying the hearing any longer.

The Court: And have you, Mr. Westover?

Mr. Westover: No, your Honor. I didn't even get to them. Mr. Chapman was using the books.

Mr. Chapman: There was only one book.

The Court: You looked at some other books, did you?

Mr. Westover: Yes, sir, the exhibit books.

The Court: You have completed the examination of the black book which you had before recess?

Mr. Westover: Certainly, your Honor. That I already had ready to put in before recess. [661]

The Court: I think perhaps we had better do

(Testimony of Frank C. Noon.)

this: It does not make any difference to me because I do not eat dinner, so I am going to recess until 7:30. We will just lock up the courtroom here and leave your books as they are and come back at that time, and then we will continue until we finish all the evidentiary matters and then put the matter over for argument until tomorrow morning. I am afraid if we proceed now on the matter of the books that we will be here straight through to 9:00 o'clock and the longer we go the more tired everybody gets, including myself.

Mr. Chapman: With one amendment I would like to concur, the amendment being, in order that I get a little more time on the books, if somebody will bring me a sandwich and leave your courtroom open we will be ready by 7:30. I would like to be locked in here with them until then.

Mr. Works: May I inquire how much further examination is needed?

Mr. Chapman: Examination of the books?

Mr. Works: Yes.

Mr. Chapman: I certainly can't tell you. I am trying to cut it off to meet the court's convenience and counsel's convenience.

Mr. Works: My understanding was that you wanted to look at this one book.

Mr. Chapman: That is right. [662]

Mr. Chapman: I looked at the index only. There is no chance to examine 300 pages. I don't know what I will find.

The Court: Is there any objection to that?

Mr. Angell: We have to keep somebody here then to keep track of these records and it means

(Testimony of Frank C. Noon.)

that we can't go out to dinner except one at a time.

Mr. Chapman: It certainly won't take all five of you. You can take turns. I have offered to skip whatever dinner I was going to get.

The Court: I see in the back there a young man who seems to be officially connected on this side of the table.

Mr. Angell: That is Mr. Adams, your Honor, my law parner's associate, and I think when we get through we might ask to have him admitted here.

Mr. Chapman: There is also a representative of the San Francisco Bank here.

The Court: Is there somebody here who can be a custodian of the records?

Mr. Purmort: Yes.

The Court: Why not leave him here then and Mr. Chapman and somebody can get some sandwiches and coffee for them.

Mr. Fitting: May I suggest, if the court please, before court reconvenes that we be given just a short opportunity to look at what Mr. Chapman has designated and that will probably save a lot of the court's time too. We had just started [663] looking through what he was planning to offer in this book when the recess finished.

Mr. Chapman: Why don't you continue with that and I will work on the exhibit books?

The Court: Then what I will do, I will recess until 8:00 o'clock. You can come back at 7:30 and do that, because you people being familiar with the books it will not take you long to look at what Mr. Chapman has picked out.

(Testimony of Frank C. Noon.)

Mr. Bishop: He has given us 32 pages to look at already.

Mr. Angell: And that is only in one book.

The Court: Some of those pages in those books you can read while you are opening them almost, especially in the minute books.

Well, then, is it agreeable to everybody—what is your name, young man?

Mr. Purmort: Purmort, P-u-r-m-o-r-t.

The Court: Why not leave Mr. Purmort here in charge of the books and somebody get a sandwich for him and Mr. Chapman, and we will reconvene at 8:00 o'clock, and you come back at 7:30 and look at what Mr. Chapman has designated, but after that we will stay until we finish the evidence to-night.

Mr. Dusenbery: If the court please, I assume your Honor's ruling made some time ago that these books cover a great many subjects and are to be examined by the attorneys [664] only——

The Court: Yes, that is correct.

Mr. Chapman: That has already been my understanding.

The Court: If he has to have a stenographer at his elbow, that should be all right.

Mr. Dusenbery: Yes.

The Court: But by the attorneys only and none of the parties or officers of any of the associations.

Mr. Chapman: That has been respected.

(Testimony of Frank C. Noon.)

The Court: Very well. Recess until 8:00 o'clock.

(Whereupon, at 6:10 o'clock p.m., a recess was taken until 8:00 o'clock p.m., of the same date.) [665]

April 7, 1950—8:00 P.M.

The Court: The appearances are the same. Proceed, Mr. Chapman.

Have you concluded your investigation of the records?

Mr. Chapman: I have done all that I could with the time that I had, your Honor, and I am willing to rest the attorneys' fees matter on it.

The Court: And have you called attention to opposing counsel to the matters which you wish to introduce?

Mr. Chapman: Yes, I gave them a list.

The Court: And they have examined them?

Mr. Angell: We assume so. He has given us a great deal.

Mr. Chapman: I gave you a list.

Mr. Fitting: We have examined the list.

The Court: You have examined the list?

Mr. Fitting: Yes.

The Court: Very well.

FRANK C. NOON

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Chapman: LA-84 from the special master's proceedings, to be marked for identification, please, Mr. Clerk.

The Clerk: 2-27-50-33. [666]

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-33 for identification.)

Mr. Angell: What is this here?

Mr. Chapman: Just what you saw.

Mr. Angell: Are you offering it in evidence?

Mr. Chapman: I am getting it marked for identification first so I can refer to it.

Showing your Honor 2-27-50-33.

(The volume referred to was passed to the court.)

Mr. Angell: We would like to make our objections to it after your Honor has read it.

Mr. Chapman: Apparently some of counsel have not seen this, your Honor.

Mr. Works: I haven't seen it.

(The volume referred to was passed to counsel.)

Mr. Chapman: I offer this in evidence, your Honor, to show the disposition made of some of the assets seized of the Los Angeles Bank and also bearing on the question of—

(Testimony of Frank C. Noon.)

The Court: I did not hear you.

Mr. Chapman: To show the use made of assets seized from the Los Angeles Bank and also bearing on the question of the allowance of attorney fees.

The Court: To show what?

Mr. Chapman: The use made by the defendant San Francisco Bank of assets seized from the Los Angeles Bank in connection [667] with this litigation. I think it is obvious that they are paying hotel bills for their co-defendants to the extent of \$121 is some indication of what use is being made of our assets.

Mr. Angell: It might have been Portland, your Honor.

Mr. Fitting: On an attorneys' fees hearing I fail to see the relevancy of anything that is done with the assets. Perhaps on the merits of the case that might be material, but not on this matter.

The Court: This afternoon that question arose and I passed on it.

Mr. Fitting: It still seems to us to be highly immaterial and irrelevant.

The Court: It may be you do not have as good an imagination as I do to see the materiality of it, but I see counsel's point.

What is the date of that?

Mr. Chapman: March, 1948, your Honor, if I remember. Perhaps the clerk should read it.

(Testimony of Frank C. Noon.)

The Clerk: March 30, 1948.

The Court: A hotel bill of Divers, Adams and somebody else.

Mr. Chapman: Eisler, one of the counsel for the Home Loan Bank Board, one of the defendants in this litigation.

The Court: And you offer this only in connection with [668] the point you made with relation to the payment of counsel fees?

Mr. Chapman: That is right.

The Court: That is, that it goes to the use of funds which you claim are funds of the Long Beach Association?

Mr. Chapman: In part; yes.

The Court: And you also claim, and the Los Angeles Bank claims, are funds belonging to the Los Angeles Bank?

Mr. Chapman: I claim that it is, as a stockholder of the Los Angeles Bank in behalf of the Long Beach Association. It is obviously counsel fees for one of counsel in the litigation for expense fees and for certain of the parties in the litigation, and it has been paid from our assets.

The Court: Where is the itemized bill?

Mr. Chapman: Your Honor, that is in this vast group of papers.

The Court: I know, but after all what did they spend that money for?

Mr. Chapman: I could guess.

The Court: It will be admitted for the limited

(Testimony of Frank C. Noon.)

purpose for which counsel has offered it. It certainly has no other probative value.

(The document referred to was received in evidence as Joint Petitioners' Exhibit No. 2-27-50-33.)

Mr. Chapman: Now, your Honor, on LA-300, the part of [669] which Mr. Angell introduced in evidence, I have spent the time trying to get the material portions of it. We have a number of page references starting on page 46.

The Court: If you will let me look at the book and if you can call my attention to the page as you call them out.

(The volume referred to was passed to the court.)

Mr. Chapman: Page 46, your Honor, headed "California Litigation." With the limited time I had, I didn't have time to make notes of the substance of those.

The Court: This is the minutes of January 24, 1948.

Mr. Chapman: I am offering that in evidence.

Mr. Fitting: We object on the ground that that is irrelevant.

Mr. Angell: We have the same objection.

The Court: The same objection which has heretofore been made and stated is now deemed to have been made on behalf of everybody who is not offering this document.

(Testimony of Frank C. Noon.)

Mr. Westover: Not quite, your Honor. I have not joined in the offer to that document, nor am I objecting to it.

Mr. Works: That is our position, your Honor.

The Court: Except those who take no position at all.

Mr. Works: That is right.

The Clerk: The number is 2-27-50-34.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-34 for identification.) [670]

The Court: The next one.

Mr. Chapman: Page 55 under the heading "Pending Litigation."

The Court: To where?

Mr. Chapman: I will have to see, your Honor.

The Court: To the end?

Mr. Chapman: To the end of the reference to that material.

The Court: To the end of the resolution on page 56, which appears to be a new subject matter.

This on page 55 is the minute of April 16, 1948, with the heading "Pending Litigation." That will be No. 35.

Mr. Chapman: That went over onto page 56, did it not, your Honor?

The Court: It is page 55 of LA-300, minutes dated April 16, 1948, and page 56 down to the beginning of "Application for Permission," and it is numbered 2-27-50-35 for identification.

(Testimony of Frank C. Noon.)

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-35 for identification.)

The Court: Next.

Mr. Chapman: Page 64; heading "Pending Litigation."

The Court: That is the minutes of July 23, 1948, page 64, marked for identification as [671] 2-27-50-36.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-36 for identification.)

The Court: It has some initials over at the side in ink. I do not see any significance to them.

(The volume referred to was passed to counsel.)

Mr. Angell: That was rescinded, was it not? Isn't that the one?

The Court: No, that is where somebody stipulates to a judgment in a case filed in San Francisco apparently, or refused to.

Mr. Chapman: I think you can include the initials from "Pending Litigation" to "Missoula."

The Court: The initials are "B.A.P.," I take it.

Mr. Chapman: I think that is correct.

The Court: What is the name of the chairman who signed this?

Mr. Angell: Benjamin A. Perham, P-e-r-h-a-m.

The Court: It will be marked for identification.

(Testimony of Frank C. Noon.)

Mr. Chapman: I am offering it in evidence, your Honor, not just for identification.

The Court: Let us get your identification first and then you can get all your objections in.

Mr. Chapman: The next is pages 69 to 72, inclusive. Page 69 starts with "Pending Litigation."

I would like to see that page 69 a moment, your Honor. [672] My notes are not complete.

(The volume referred to was passed to counsel.)

Mr. Chapman: That is right, from the top of the page to the bottom of page 72.

The Court: That appears to be minutes of August 25, 1948, pages 69 to 72 and is No. 37, Mr. Clerk, for identification.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-37 for identification.)

The Court: There are some pencil notations made in the margin here. I do not know whether you are offering those or if they have been made by somebody in the examination of these minutes.

Mr. Chapman: I am offering whatever is on the page, your Honor.

Mr. Bishop: May I see it, please?

(The volume referred to was passed to counsel.)

The Court: I do not know the significance of

(Testimony of Frank C. Noon.)

it. It says something about being sent to Mr. Dusenbery.

Mr. Angell: We don't know whose it is, but we have no objection.

The Court: Let me ask Mr. Chapman: You did not make those notes?

Mr. Chapman: No, I have never marked their books in any way, your Honor. [673]

The Court: Well, it says, "Copy of following sent to V. Dusenbery, 9-21-49." These minutes are dated August 25, 1948, which would be 13 months after the minutes.

Mr. Angell: Unquestionably, your Honor, there is some secretary I think that was asked to send a copy of that to someplace and they made the note on there. That is all it could be.

The Court: I do not know.

Mr. Chapman: I don't either, but I still would like to have it in evidence.

The Court: Very well. Pages 69, 70, 71 and 72, the entire three pages of the minutes of August 25, 1948, will be marked No. 37 for identification.

Mr. Chapman: The next is pages 74 to 77, your Honor. May I see where it starts again? I think it says "California Litigation."

(The volume referred to was passed to counsel.)

Mr. Chapman: No, "Annual Stockholders' Meeting" is our starting point on that one.

The Court: To where?

(Testimony of Frank C. Noon.)

Mr. Chapman: To the end on page 77.

The Court: To the end where it begins "Financial statement"?

Mr. Chapman: That is right.

The Court: It says the meeting adjourned. [674]

Mr. Chapman: That is where it stops.

Mr. Angell: What is the date of the meeting, your Honor?

The Court: I will identify it as soon as I read it. That is No. 38.

Mr. Angell: What is the date of that?

The Court: It appears to be the minutes of September 19 and 20, 1948, at which there were eight directors present and four did not get there, beginning with "Annual Stockholders' Meeting of September 20, 1948," on page 74, all of page 75, all of page 76 and that portion of page 77 which ends just before the words "financial statement."

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-38 for identification.)

Mr. Chapman: Next is page 90, starting with "California Litigation."

The Court: Page 90?

Mr. Chapman: Page 90 I have here, "California Litigation."

The Court: Page 90 is not there. It is page 89 on one side and somebody forgot to stamp 90.

Mr. Chapman: That is right.

(Testimony of Frank C. Noon.)

The Court: That is to say, correctly speaking, it is the page between page 89 and page 91.

Mr. Chapman: It is an unnumbered page.

The Court: "Costs of California," just that short paragraph? [675]

Mr. Chapman: No, the next paragraph. It is those two paragraphs together.

The Court: Very well. And that refers to page 955 of the exhibit book.

Mr. Chapman: That is correct, which I think is already in evidence, your Honor.

The Court: The minutes of December 17 and 18 of 1949, found on the unnumbered page occurring between pages 89 and 91, beginning with the title "Cost of California Litigation to Date" and ending with the end of that page where it says that the meeting was recessed at this time for luncheon to reconvene at 2:00 p.m., will be 39 for identification.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-39 for identification.)

Mr. Chapman: I was wrong about that page 959, your Honor. I am showing it to other counsel.

The Court: The book states that the directors were supplied with the detail of the costs of the California litigation to date in the total amount of \$44,284.46, which schedule will be found on page 955 of the exhibit book.

Mr. Chapman: Here is the page, your Honor. It is one that hasn't been entered, your Honor.

(Testimony of Frank C. Noon.)

(The volume referred to was passed to the court.)

The Court: Very well. Page 955 will be No. 40, of [676] LA-96. It has a date as of December 15, 1948.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-40 for identification.)

Mr. Chapman: Page 91 of LA-300.

The Court: Why not put that all in the same exhibit?

Mr. Chapman: That is another one. That is the report of the attorneys' conference in Washington, D. C., page 91.

The Court: Page 91 of LA-300. This entry here, "Messrs. Dusenbery, Angell and Holmes left the meeting," is that the material part?

Mr. Chapman: No, "Report of the Conference." The top of the page, "Report on Attorneys' Conference."

The Court: Do you want anything else on that page while we are on it? If so, let us get it marked.

Mr. Chapman: Down to the line "Harold Holmes, president of the bank."

Your Honor, I think I will take that down to the full page, to the end of the page.

The Court: Page 91?

Mr. Chapman: All of page 91.

The Court: That will be No. 41.

(Testimony of Frank C. Noon.)

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-41 for identification.)

Mr. Westover: Does it refer to a date, your Honor?

The Court: It is page 91 of LA-300 and purports to be [677] the minutes of December 17 and 18, 1948.

Mr. Chapman: May I see page 99, your Honor?

(The volume referred to was passed to counsel.)

Mr. Chapman: That is the Home Loan Bank Board's resolutions, to the top line of the following page.

Mr. Bishop: What page, please?

Mr. Chapman: 99.

The Court: That will be marked 42, and is page 99 of LA-300, minutes of January 13 and 14, 1949, beginning with the title "Home Loan Bank Board Resolutions," and ending with the first sentence on page 100.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-42 for identification.)

Mr. Chapman: On page 100, beginning with the words "California litigation."

The Court: The same book?

Mr. Chapman: The same book.

(Testimony of Frank C. Noon.)

The Court: And the same date?

Mr. Chapman: Yes.

The Court: No. 43 will be page 100 where it begins "California Litigation," through that page and all of pages 101 and 102 of the minutes of January 13, 14, 1949, of LA-300.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-43 for identification.) [678]

Mr. Chapman: May I see page 105 before I start?

(The volume referred to was passed to counsel.)

Mr. Chapman: Page 105, starting with "Costs of California Litigation," ending on page 106 with something about Azusa.

The Court: That will be 44, beginning on page 105 with the heading "Costs of California Litigation to Date," and ending on page 106, beginning "Application for permission to organize a new Federal, Azusa, California," of LA-300, minutes of February 25 and 26, 1949.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-44 for identification.)

Mr. Chapman: Page 112, starting with "Consideration of By-law Indemnification of Directors," and running to the end of that subject matter.

The Court: Which is one paragraph. The next

(Testimony of Frank C. Noon.)

one starts "Attendance at National Convention, June, 1949."

Mr. Chapman: That is where we end.

The Court: You end there?

Mr. Chapman: That is right.

The Court: No. 45, page 112, LA-300, minutes of March 29 and 30, 1949, being one paragraph starting with "Consideration of uniform by-law to provide for indemnification of directors." [679]

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-45 for identification.)

The Court: Next.

Mr. Chapman: Next is page 127, "Report of California Litigation," to where that subject ends on page 128.

Mr. Angell: After your Honor has read this one, I want to make a further objection. That is one I think is particularly objectionable because it hasn't a thing to do with this case and it does have something to do with counsel in the case. I submit, your Honor, there is nothing relevant in there to this litigation or to the application for attorney fees.

The Court: Very well. I have read it.

Mr. Angell: There is one part of it there, your Honor, that I think could not be considered for any purpose whatsoever that has anything to do with this case. I will ask that in so far as that part is concerned that it not be admitted in evidence. It

(Testimony of Frank C. Noon.)

certainly could do no one any good in the case at all.

Mr. Chapman: I am interested in what part that is when the court is through reading it.

Mr. Angell: It is the part that has to do with Mr. Bishop, and I don't think you even ought to offer it.

(The volume referred to was passed to counsel.)

Mr. Chapman: I would like to talk to my colleagues about—— [680]

(Conference between counsel.)

Mr. Chapman: I don't think he needs the objection. I will withdraw that paragraph as far as my offer is concerned. That is the last paragraph on the page, 127. The balance of it I would like to offer though.

The Court: Of course the whole page is going to have to be photostated and there are many things in each one of these pages that are immaterial, as I have read them. There are things, however, in the text of the whole subject matter which are material, and all this says is that Mr. Dusenbery is objecting to Mr. Bishop's fees.

Mr. Angell: I don't think it says that. I think the Board was raising some question.

Mr. Chapman: You mean they are fighting with each other over fees as well as us?

The Court: I do not think it says the Board is raising any question at all. And certainly if it were going to reflect badly upon any counsel in this

(Testimony of Frank C. Noon.)

case I would not admit it because I do not think it is necessary for the rights of the parties here who are involved, but I do not see how this hurts anybody. If counsel wants to leave it out as being immaterial, I will leave it out. But it is still going to be photostated if it is admitted.

Mr. Chapman: I think I will continue the offer.

The Court: The rest of it is certainly material to the [681] matter of attorney fees.

Mr. Chapman: I think I will leave it in.

Mr. Dusenbery: May it please the court, that is a matter that was identified when I was out at lunch, and I would like to look at it as long as my name has been brought into the matter. I don't know what it says.

(The volume referred to was passed to counsel.)

Mr. Chapman: A complete list was given to all counsel, Mr. Dusenbery.

Mr. Dusenbery: If the court please, if there is any statement in here to the effect that I objected to Mr. Bishop's fees, I fail to find it. I do find this provision: "The directors discussed with Mr. Dusenberry and the president the status of counsel fees heretofore paid by this bank, particularly the statements of Mr. Irving Bishop of Los Angeles. Mr. Dusenbery stated that he had not approved Mr. Bishop's statements for the past few months due to the fact that it was his understanding that Mr. Bishop's efforts were largely in connection with

(Testimony of Frank C. Noon.)

settlement negotiations carried on in activity with the president."

Now, if the court please, the reason that Mr. Bishop's fees were not approved by me is because Mr. Bishop's services were——

The Court: I do not care what your reasons are. The only thing is whether or not it is material. I cannot see [682] where that hurts Mr. Bishop, because it would be a strange set of lawyers, even if you were on the same side of the case, if you did not have a disagreement once in a while. And I do not say that you are right or wrong in objecting or not objecting. The only point I am making is that it does not destroy the materiality of the rest of it, and some of the things in there are material to this hearing, and if you are going to photostat the whole thing you will have to include it.

Mr. Dusenbery: What I wanted to point out, your Honor, is that the minute was misconstrued by your Honor with reference to the statement that I made. I don't think it is in there and certainly it was not intended that anything of that kind should have taken place. I am simply explaining that during the spring of 1949, while the settlement negotiations were going on, Mr. Bishop was active in the settlement with Mr. Holmes, the president of the bank, and for that reason he approved Mr. Bishop's fees and not myself. That is the significance of that statement.

Mr. Chapman: I think I would like to have it in after the discussion.

(Testimony of Frank C. Noon.)

The Court: Especially in view of Mr. Dusenbery's statement.

In any event, page No. 127 of LA-300, minutes of June 19 and 21, 1949, beginning with the words "Report on California [683] Litigation," on that page, and ending with the portion just before the words "lines of credit," on page 128, will be marked for identification as No. 46.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-46 for identification.)

Mr. Chapman: Next is on page 141, "Amendment to By-laws, Indemnification of Directors."

The Court: No. 47, page 141 of LA-300, minutes of August 13-14, 1949, beginning with the words "Amendment to by-laws," and ending with the words, "Mr. Verne Dusenbery left the meeting."

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-47 for identification.)

Mr. Chapman: Page 156 is the next, your Honor, "Change in Bank By-laws." That also deals with indemnification.

The Court: Ending with the next subject matter, "trustee, mortgages"?

Mr. Chapman: That is right.

The Court: No. 48, page 156, minutes of October 24-25, 1949, beginning with the words "Change in Bank By-laws," and ending with the words just before "Trustee of Mortgages" on the same page.

(Testimony of Frank C. Noon.)

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-48 for identification.)

Mr. Chapman: May I see that again, your Honor? [684]

(The volume referred to was passed to counsel.)

Mr. Chapman: Page 162, starting with "Appointment of Counsel for California Litigation."

Mr. Fitting: If the court please, I would like to make an objection with the view of shortening time. As I understand it, no one is joining in these offers, that is, none of the proponents of this motion are joining in these offers of evidence. In other words, they are willing to rest their case on what, as I understand it, is in the record now. I don't see how Mr. Chapman can join in the motions since it is not his attorney fees that are involved, it is O'Melveny & Myers, Mr. FitzPatrick and Mr. Gilbert, so I don't see any point in offering this evidence.

The Court: The last time I recall that Mr. Works and Mr. Gilbert were sitting in the jury box, they said that they joined in all motions and wanted to join in all motions unless otherwise indicated. Is that correct?

Mr. Works: I thought permission to do that was denied.

The Court: I did. I denied it.

(Testimony of Frank C. Noon.)

Mr. Works: I may say that any indications I made before dinner toward joining in any of these offers have been reversed since dinner.

The Court: You do not join?

Mr. Works: I do not join and, as far as I am concerned, it is all cumulative. [685]

Mr. Angell: I am going to move to strike all of the testimony offered by——

The Court: Let us get his offer finished before we start arguing about it. You can argue about it in a few minutes, but let us finish with this book.

This last one here is page 162, minutes of November 16, 17 and 21, 1949, LA-300, and will be No. 49 for identification. It begins with the words, "Appointment of Counsel for California Litigation," and ends with the end of that page.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-49 for identification.)

Mr. Chapman: Next is on page 163, dealing with the examination of the bank, and particularly the paragraph "No reserve for contingencies of Los Angeles litigation."

The Court: That runs way on over. Where is that?

Mr. Chapman: If I may have the book a moment, I can locate the subparagraph number.

(The volume referred to was passed to counsel.)

(Testimony of Frank C. Noon.)

The Court: A mere examination of this would take a great deal more time than I think we have here because it says——

Mr. Chapman: It is just one paragraph, your Honor.

The Court: Let us limit it to that then.

Mr. Chapman: It is subparagraph 1 on page 163, starting with the words, "Examination of the bank."

The Court: The first paragraph? [686]

Mr. Chapman: That is right.

The Court: Paragraph arabic 1?

Mr. Chapman: That is right.

The Court: This is the second entry on this page. This will be No. 50 on page 163, minutes of November 16, 17 and 21, 1949, beginning with the words "Examination of bank as of September 16, 1949" and ending with the end of paragraph arabic numeral 1 on that page, and specifically excluding all of the rest of the report of examination?

Mr. Chapman: That is correct.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-50 for identification.)

Mr. Chapman: Now if I can see page 171 for a moment?

(The volume referred to was passed to counsel.)

Mr. Chapman: On page 171, starting with "Cal-

(Testimony of Frank C. Noon.)

fornia Litigation" and ending with "Home Loan Bank Board."

The Court: Ending with the next paragraph?

Mr. Chapman: That is right. The end of the page where it says the meeting was adjourned.

The Court: That will be No. 51. It is on page 171 of LA-300 and is the minutes of December 16 and 17, 1949, beginning with the caption "California Litigation" and ending with the words which precede the words "Home Loan Bank Board Resolution." [687]

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-51 for identification.)

The Court: Now you want to go to 172, I suppose, "California Litigation"?

Mr. Chapman: That is right, and ending on page 174.

The Court: No. 52, beginning on page 172 of LA-300, minutes of December 16 and 17, 1949, with the caption "California Litigation" and including the balance of that page, all of page 173, and that portion of page 174 ending with the words which precede the words "release of Portland records."

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-52 for identification.)

Mr. Chapman: 175——

The Court: That is already marked. The defendants introduced that as Defendants' F.

(Testimony of Frank C. Noon.)

Mr. Chapman: On 176, if I may look at it a moment?

(The volume referred to was passed to counsel.)

The Court: "California Litigation"?

Mr. Chapman: That is right.

The Court: No. 53, page 176, minutes of December 16 and 17, 1949, beginning with the words "California Litigation" at the bottom of page 176, and continuing on to page 177 to the words preceding the words "inter-bank deposit."

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-53 for identification.) [688]

Mr. Chapman: Next is 181, "Stockholders Meeting."

The Court: You mean this book really has an end?

Mr. Chapman: Yes. The words "Stockholders Meeting" at the bottom of page 181 and ending on the top of page 182.

The Court: Is that the last one?

Mr. Chapman: It is the last in that book.

The Court: No. 54 is page 181 of LA-300, minutes of January 13 and 14, 1950, beginning with the caption "Stockholders Meeting" and ending at the bottom of the page.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-54 for identification.)

(Testimony of Frank C. Noon.)

Mr. Chapman: That is all for that book. Shall we offer that now or finish with the designation first?

The Court: Inasmuch as those other things are part of the minutes you had better finish your designation. How many have you got?

Mr. Chapman: I have one more stockholders book, one group consecutively of about 10 pages, and that is it.

The Court: And you are offering page 903?

Mr. Chapman: 903.

The Court: 903 of LA-96, dated May 11, 1948.

Mr. Chapman: That is right.

The Court: Was this not offered before?

Mr. Chapman: No, it was not, your Honor.

The Court: Well, if it was not, all right, but it seems [689] to me that it was.

It is marked No. 55, and it is page 903 of what is described as LA-96, and it is dated May 11, 1948, Resolution 721 of the Home Loan Bank Board.

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-55 for identification.)

Mr. Chapman: I think we have one book, Mr. Noon, that is not identified, the minutes of the annual meeting of stockholders.

Q. Have you identified that for us, Mr. Noon?

Mr. Bishop: We will stipulate to his identification of the book, but not as to the evidence or materiality.

(Testimony of Frank C. Noon.)

Mr. Chapman: It is marked LA-87. It is the minutes of the stockholders meeting. I am offering pages 33 to 49 inclusive as one offer.

The Court: I am going to have to take a short recess.

Mr. Bishop: Your Honor, could I be heard a minute? I would like the indulgence of the court and also the indulgence of counsel. I see no reason for Mr. Noon or Mr. Purmort to stay here as representatives of the Bank if all counsel are willing to stipulate that the records may be locked up in that little room over there tonight and released to us tomorrow, because we will have to open up the vault at the bank late hours now, and Mr. Noon is the only one that can do it, and he is serving no gainful purpose here except making himself [690] more and more tired, and he and Mr. Purmort certainly should be permitted to go home if nobody has any different ideas.

Mr. Chapman: I don't disapprove. It is all right with me.

Mr. Sutter: No objection.

The Court: If there is no objection, why certainly Mr. Noon is excused from the subpoena and the other gentleman. The matter of locking them in that closet over there, however, is a different thing. It will be locked in some closet, but I do not know who has a key to that closet.

The Clerk: I have, your Honor.

The Court: Very well. The clerk has. We will lock them in that closet over there then.

Mr. Bishop: Thank you, your Honor.

(Witness excused.)

The Court: This is your last offer?

Mr. Chapman: That is right. It is marked LA-87 in the special master's examination, and it is headed "Minutes of Stockholders Meeting" on page 33, the annual meeting for '46, and runs through to page 45, excluding the glued-in material. In other words, all I want is the typed pages which are actually numbered. There are annual statements in there that we don't need to be concerned with.

The Court: 33 to 45? [691]

Mr. Chapman: 33 to 49 inclusive.

It has been suggested, your Honor, that the annual statements should likewise go in as being reported to the stockholders. I think the annual statements can be subject to no objection. They are certainly public records by now.

The Court: I will mark that No. 56, pages 33 to 49, which appear to be minutes of the adjourned stockholders meetings of the Federal Home Loan Bank of Portland.

Mr. Chapman: That is the annual 1946 meeting.

The Court: June 10, 1946, is the caption, and it is in the book marked LA-87 in the discovery proceedings, and the book is entitled on page 1, "Minutes of Stockholders Meetings, Federal Home Loan Bank of Portland, District 11."

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-56 for identification.)

The Court: Now do you have some other matter to mark for identification?

Mr. Chapman: That closes the identification marking, your Honor.

Mr. Angell: We would like to have one offered, your Honor, marked for identification if the others are allowed in, and that is in Volume LA-300, page 175.

The Court: That is already in. That is your F. That is what you offered and that was received in evidence as 2-27-50-F this afternoon. [692]

Mr. Angell: May I see it, your Honor?

(The volume referred to was passed to counsel.)

Mr. Angell: Is it the whole resolution?

The Court: The whole resolution. You offered down to here. (Indicating.)

Mr. Angell: That is what I thought. I think what we want is to include this "California Litigation."

The Court: That has already gone in—no, that is not in, so we will put in as 2-27-50-G page 175, beginning with the words "California Litigation" over to "election of president and secretary" on page 176.

(The document referred to was marked San Francisco Bank's and Official Defendants' Exhibit No. 2-27-50-G for identification.)

The Court: Now this last exhibit which you offered, Mr. Chapman, it is going to take me a little time to examine. Is this all you are offering now?

Mr. Chapman: That is right.

The Court: Did you have something?

Mr. Westover: Yes, your Honor. I want to join with Mr. Chapman in the offer of the minutes of the annual stockholders meeting of July 29, 1947—that is LA-87 according to the special master's numbering system—pages 37 to 41, that one resolution on those particular pages and the respective votes on it.

The Court: That is part of the exhibit offered by Mr. [693] Chapman.

Mr. Westover: That is right.

The Court: As No. 56.

Mr. Westover: That is right. I want to join with him on that.

The Court: Why not make it simple and join with him in Exhibit No. 56?

Mr. Westover: I will, your Honor. I have no objection to the others. That one I do urge definitely.

The Court: Very well. You can make that argument.

Do you have anything else?

Mr. Westover: Yes, your Honor, I have one more.

The Court: We will have a short recess first.

(Short recess.)

Mr. Works: We join in the offer of Exhibit 56, your Honor.

The Court: Very well.

Mr. Westover: At this time, your Honor, I will

offer LA-52, page 91, the financial statement in the center of the page there showing the condition of the San Francisco Bank as of the close of business March 29, 1946, with total surplus of \$2,868,307, and total combined assets of the two combined banks of \$58,000,000 plus.

I might add the pencil mark on the side of the page was not mine. I have no marks on the Bank's books or [694] records at any place.

The Court: Where do you begin on this page? At the top of page 91?

Mr. Westover: No, your Honor, I think all that I care to offer is that dealing with the financial statement.

The Court: Beginning with "Mr. Johnson presented"?

Mr. Westover: That is correct, your Honor, and ending at the conclusion of the financial statement, just the one paragraph.

The Court: I am a little confused. At the bottom of page 89 of this book, it starts with "Order 5082, March 29, 1946," which is the order which has heretofore been discussed very much in the pleadings and affidavits and arguments and briefs of counsel, and continuing on page 90 it finishes the text of that Order 5082, then beginning at the top of page 91, Order 5083, dated March 9, 1946, and the next caption is Order No. 5084, March 29, 1946, pursuant to Section 25 of the Federal Home Loan Bank Act as amended, and the powers vested in me by law the Federal Home Loan Bank of Los Angeles is dissolved, and it says "Mr. Johnson pre-

sented the statement of condition of the Federal Home Loan Bank of San Francisco as of the close of business March 29, 1946, a copy of which follows. Whereas this March 29, 1946, resolution of 5082 on page 89 and the following Orders 5083 and 5084 are the ones dissolving Portland, creating San Francisco, or rather [695] consolidating Portland and changing its name and dissolving the Los Angeles Bank.

Mr. Westover: Your Honor please, the minutes start several pages earlier. It is the minutes of a board of directors meeting of April 8, 1946. If I may see the book?

The Court: Yes, that is correct; on page 88.

Mr. Westover: Then they apparently have copied in the various orders and various other business before the board of directors, but the particular part that I was offering at this time—because I think those orders are already in the record, all of those orders—but the particular point I wanted to offer at this time was the financial statement as reported by Mr. Johnson, the then president of the purported San Francisco Bank, as of March 29, 1946. It is just that one paragraph showing the surplus they then had on hand and the total assets and liabilities.

It might be less confusing, your Honor—and I have no objection—to taking the entire minutes of that meeting of April 8, 1946, of the board of directors.

The Court: The only thing I have in mind, if this is material in connection with this matter, it makes it a little senseless to pick out this particular

thing in view of the fact that it follows and appears to be a part of Order No. 5084.

Mr. Westover: I am sorry. I didn't interpret it as a [696] part of Order 5084.

The Court: I do not know that it is. It is set up in the same part without an additional caption or heading.

You were about to say something, Mr. Works.

Mr. Works: I have another small matter here, your Honor.

Mr. Westover: Your Honor please, we might clarify it by offering a few more pages, as Mr. Bishop says, to wit, the entire board meeting of April 8, 1946, which begins a few pages earlier.

The Court: There are some things in here that certainly cannot have anything to do with this. There appears to be nothing from the beginning of the minutes of the meeting on page 88 down through 89, 90 and 91, ending with the words "Room 510, Los Angeles, California," which could possibly be subject to the objections which I have heretofore sustained on the ground that there would be a disclosure of confidential information or interfere with the business of the bank.

In any event, the portion I have indicated will be marked as No. 57, beginning on page 88, where I am now marking in pencil, beginning with "Minutes of a special meeting of the board," and ending—that is, covering the balance of page 88, all of 89 and all of 90, all of 91 down to the point where I am now marking in pencil "end 57." [697]

(The document referred to was marked Joint Petitioners' Exhibit No. 2-27-50-57 for identification.)

The Court: Anything else?

Mr. Westover: That is all, your Honor, that I care to offer at this time.

The Court: Mr. Chapman?

Mr. Chapman: That is all on my part, your Honor.

Mr. Works: May I make an offer, your Honor?

The Court: Let us see if Mr. Chapman is through.

Mr. Chapman: I understand that these are only in for identification.

The Court: Up to now.

Mr. Chapman: I want to offer them when Mr. Works has concluded.

The Court: Yes.

Mr. Works: In support of our showing that action No. 5678 and the cross-claim of Los Angeles Bank in action 5421 were brought in good faith and on reasonable grounds, which is one of the issues involved in this matter——

The Court: Excuse me. In support of your claim of good faith?

Mr. Works: In support of our showing that action No. 5678 and the cross-claim in action No. 5421 were brought in good faith and on reasonable grounds, I desire to offer by reference a portion of the verified petition filed on behalf [698] of the Long Beach Association on July 6, 1948, which

asked, among other things, for the dissolution of the San Francisco Bank.

The Court: That is the cross-claim or is that the order to show cause?

Mr. Works: I am referring to the verified petition and motion filed in that connection, your Honor.

Mr. Chapman: That was presented at Fresno and you issued an order to show cause on it.

The Court: Yes, I remember, but there are two phases of that. One of them they have in their cross-complaint and then there has been a proceeding pending by way of a motion for an order of dissolution.

Mr. Chapman: That is the one.

Mr. Works: That is the one I am referring to. It is labeled a petition and motion.

The Court: Very well.

Mr. Works: The filing date was July 6, 1948.

The portions to which I refer are the following—

The Court: Excuse me. Do you think you can find that, Mr. Stacey?

Mr. Works: I have the file here, your Honor. Starting at page 4, line 22:

“That Holders of Shares Representing More Than $\frac{2}{3}$ of the Voting Power of the Purported San Francisco Bank Have Voted to Dissolve Said San Francisco Bank, if It Ever Existed. That ballots were circularized among such associations, members and stockholders of such bank. That the results of such ballots are summarized as follows:

“Petitioners are informed and believe and therefore allege that there are presently issued and outstanding 116,222 votable shares of stock of the said San Francisco Bank, having a par value of \$100 each, entitled to one vote for each share. That of such shares 84,635 or 72.8 per cent voted as follows:

“(a) In favor of dissolution of said San Francisco Bank:

“79,242 shares,

“68 per cent of the total votable shares outstanding.

“(b) Against further use of Los Angeles assets by San Francisco Bank to litigate against Los Angeles Bank.

“80,310 shares,

“69 per cent of the total votable shares outstanding.

“(c) Against dissolution of said San Francisco Bank: [700]

“5393 shares,

“4.6 per cent of the total votable shares outstanding.

“(d) In favor of further use of Los Angeles Bank assets by San Francisco Bank to litigate against Los Angeles Bank:

“4325 shares,

“3.7 per cent of the total votable shares outstanding.

“That Thereby More Than $\frac{2}{3}$ of the Total Stock Voting Power of the Said San Francisco Bank, If It Ever Existed, Has Voted for Dissolution of Such Bank and Restoration of the Los Angeles Bank.

“That Approximately 84% of All of the Former Members of the Purportedly Merged Los Angeles Bank Have Thereby Voted Against Such Merger. That the Owners of More Than $\frac{2}{3}$ of the Assets in the Hands of Said San Francisco Board of Directors Have Thereby Voted Against Said Officers and Directors Wasting Said Assets In Further Litigation.”

This affidavit was verified by Mr. Gregory, who is present and in a position to testify, if desired.

The Court: Do you offer his affidavit as his direct testimony?

Mr. Works: I do, your Honor. I offer it by reference [701] to the verified petition, the petition verified by him.

The Court: Very well. Do you wish to cross-examine him?

Mr. Angell: We want to get in our objection, your Honor, that it is incompetent, irrelevant and immaterial, not within the issue of this case.

And on the furth ground that there is no provision of law for the dissolution of a Federal Home Loan Bank by the vote of its stockholders, that that is given by the act of Congress entirely to the Board or to the then Commissioner.

The Court: Let us keep in mind the purpose for which it is offered.

Mr. Angell: I understand it is being offered to show the good faith.

The Court: Solely to substantiate the claim of the movants here for fees on the ground that they have acted in good faith, but if I sustain your

objection I would decide the lawsuit on its merits. If I overrule your objection on the grounds that you have made them, I would decide the lawsuit on its merits. However, I consider the evidence for the purpose for which it is offered and it may be received for that limited purpose.

Mr. Angell: Are you through, Mr. Works?

Mr. Works: Yes.

The Court: Do you have something else? [702]

Mr. Chapman: Yes. On this last offer that was made, I do not feel it necessary to offer that into evidence because it is in a pleading in this litigation as yet undenied and the time fixed in your order to show cause expired in August of 1949. At that moment and from that time on and now that stands as an admitted allegation in the pleadings in this litigation. I therefore think it is unnecessary to offer it into evidence.

The Court: It is offered and have been received and the objections have been overruled.

Mr. Fitting: In connection with that, I wonder if we might have a stipulation from counsel as to the facts in connection therewith, that I take it are not controverted, namely, that at that time the United States Treasury owned a majority of the outstanding stock in the San Francisco Bank. That is correct, is it not?

Mr. Chapman: No.

Mr. Westover: I wouldn't care to enter into such a stipulation, Mr. Fitting.

Mr. Chapman: Neither would I.

Mr. Bishop: Your Honor, that was shown by the

records heretofore introduced in this court when the stock books were down here before in a previous hearing, so it is before the court.

The Court: Just a moment now. Mr. Works, do you accept [703] the stipulation?

Mr. Works: No, I do not.

The Court: You do not?

Mr. Works: No.

The Court: Mr. Gilbert?

Mr. Gilbert: No.

The Court: Mr. FitzPatrick?

Mr. FitzPatrick: No.

The Court: Mr. Sutter?

Mr. Sutter: No.

The Court: Mr. Chapman?

Mr. Chapman: No.

The Court: Mr. Westover?

Mr. Westover: No.

The Court: Very well. Your offer is——

Mr. Fitting: Turned down.

The second offer is that any stock owned by the United States Treasury at that time or the Reconstruction Finance Corporation was not voted at this meeting or election, or whatever it was.

The Court: Mr. Works, do you accept his offer?

Mr. Works: I do not know what the facts are.

The Court: If you do not know, do you accept it or not?

Mr. Works: I do not accept it, your Honor.

The Court: Mr. FitzPatrick? [704]

Mr. FitzPatrick: I do not.

The Court: Mr. Gilbert?

Mr. Gilbert: I do not.

The Court: Mr. Sutter?

Mr. Sutter: I do not.

The Court: Mr. Chapman?

Mr. Chapman: I do not.

The Court: Mr. Westover?

Mr. Westover: I do not.

The Court: The offer to stipulate is refused.

Mr. Angell: We will ask for time then, your Honor, to produce the facts as to the ownership of the stock in the Los Angeles Bank and the San Francisco Bank.

(Addressing Mr. Bishop): You say they are already in?

Mr. Bishop: They are in evidence and they were exhibited to the court at that time.

Mr. Angell: May we have our answer to that motion for the dissolution of the San Francisco Bank—I think it may be pleaded in the answer.

Mr. Bishop: For the purpose of the record, those stock records were here at that hearing on September 15, 1948, when Mr. Vander Ende was on the stand.

Mr. Works: If it is in evidence, then you have no problem.

Mr. Angell: I want to make certain that it is in evidence. [705]

Mr. Works: I don't know.

Mr. Angell: I don't know either.

The Court: It is not offered in evidence in this case, that is to say, in this proceeding in this case in so far as the application for attorney fees are

concerned. If it is a part of the records and files of this court, I can take judicial notice of it.

Mr. Fitting: First, I think I can clear up the first point. May I offer again in evidence the affidavit of Ernest Riordan, filed in this case?

The Court: We went over that this morning. It was filed September 23, 1949.

Mr. Fitting: Yes. And on the second page of it, beginning at line 15, it says that up to and including August 31, 1949, either the Reconstruction Finance Corporation or the United States Treasury has always been the majority stockholder of the Federal Home Loan Bank of San Francisco, formerly called the Federal Home Loan Bank of Portland, as well as the former Federal Home Loan Bank of Los Angeles.

Mr. Chapman: Your Honor, that kind of a conclusion cannot be evidence.

The Court: I ruled on Riordan's affidavit this morning and it is stricken from the evidence. Your motion to reoffer it is denied. [706]

Mr. Fitting: I offer to re-offer just that paragraph, if the Court please.

The Court: It is denied. If it is part of the records and files of the proceedings, I will take judicial notice of it and you can argue it tomorrow.

Mr. Angell: If it isn't, your Honor, we are going to ask that we be allowed to produce a witness or an affidavit that will set forth the true ownership of the stock in this bank.

The Court: It would rather seem to me that if the United States of America, acting under the au-

thority of the acts of Congress—and that is the only way it can act—purchased and owned stock in a corporation, that the court could take judicial notice of the authority to spend that money and how much was invested in it at any time.

Mr. Angell: It is to furnish the court with the facts so that the court may take judicial notice of it that we wish to produce the true facts. It would seem that the affidavit of Mr. Riordan covers that.

The Court: Personally I do not see how it is material at the moment. It seems to me I read something someplace where the Federal Home Loan Bank of San Francisco was created as a corporation, that it could sue and be sued.

Mr. Angell: I think the act so provides.

The Court: What is the difference who owns the stock [707] then?

Mr. Angell: It makes a difference when you come to——

The Court: There have been lots of judgments sustained by the Supreme Court for the government where they owned all the stock.

Mr. Angell: That isn't the purpose of the offer.

Mr. Fitting: That isn't the purpose of the offer. The purpose of the offer is in connection with this last offer indicating that the majority of the stockholders, or 86 per cent of the stockholders, or whatever the percentage was, voted for dissolution. We were trying to make the point that the government stock, which was the majority of the stock, was not included.

The Court: They did not vote at all.

Mr. Fitting: They didn't vote at all.

The Court: How could they vote?

Mr. Fitting: That is our point.

The Court: How could the government stock vote?

Mr. Fitting: None of the stock is voting stock.

Mr. Works: Your Honor, this is all immaterial. The only showing we made was that such-and-such per cent of the voting stock voted thus and so. If there were other non-voting stockholders, that is irrelevant.

The Court: Yes, it is.

Mr. Bishop: It is right before you in this hearing and [708] uncontroverted.

The Court: I just ruled it is irrelevant.

Mr. Bishop: Well, your Honor, it is before you just for the purpose of the record in the affidavit of Mr. Bogardus, which was not stricken out, because it mentions the total number of shares in our bank, including those owned by the United States of America. That was not stricken, not the first affidavit of Mr. Bogardus.

The Court: I have ruled.

Have you concluded, Mr. Chapman?

Mr. Chapman: I haven't yet offered into evidence the matters marked for identification. I would like to make that offer.

The Court: Do you have anything more, Mr. Works?

Mr. Works: Nothing further, your Honor.

The Court: Mr. Gilbert?

Mr. Gilbert: I wish to join in the last offer that Mr. Works made.

The Court: Very well. It is admitted. The objections are overruled.

You now wish to offer in evidence the matters which were marked for identification, 36 to 56 inclusive?

The Court: 34 to 57 inclusive, according to my records.

Mr. Westover: Your Honor please, I understood that No. 57, the last minutes of the San Francisco Bank including the [709] financial statements, were admitted into evidence, or were those only marked for identification? I understood my offer was admitted.

The Court: Let me see No. 57, Mr. Stacey.

Mr. Westover: No. 57 was LA-52.

The Court: Yes, I remember now. Very well. You offer these all in evidence, 34 to 57 inclusive?

Mr. Chapman: That is right.

The Court: Is there any objection?

Mr. Gilbert: I join in the offer, your Honor.

The Court: Mr. Gilbert joins in the offer.

Mr. Works?

Mr. Works: I will join in the offer, your Honor.

The Court: Is there any objection?

Mr. Fitting: Yes. If the court please, we object on all the grounds heretofore stated, namely, that they are incompetent, irrelevant and immaterial, that to the extent they relate to settlement negotiations they are not admissible as evidence in this hearing, to the extent that they relate to communications from attorneys they are subject to the attorney-client privilege, to the extent that they purport

to relate what members of the Department of Justice, Home Loan Bank Board, have stated they are hearsay and, above all, that they are incompetent and irrelevant.

Mr. Westover: Your Honor, I wanted to join in the offer [710] of 56 and 57 only.

Mr. Angell: The San Francisco Bank joins in the objections made by the Government and the additional ground that none of the exhibits offered tends to prove or disprove any issue in the case; and upon the further ground that the evidence is produced not by the moving parties, but by parties who have no interest in the allowance or disallowance of these fees.

Mr. Chapman: Any further objection?

I would like to reply to the objections, your Honor, for a moment.

The Court: As you have presented these exhibits marked for identification, I have read them, not thoroughly of course but enough to know their content, and in each one I have endeavored to ascertain whether or not there was anything which might relate to or be material to the issue which is before the court, which is the matter of the application for attorney fees.

As I indicated a while ago on a discussion of one of the matters, of course in minutes of a meeting or of meetings such as these, there are things where you cannot segregate entirely the things that relate to the matter under discussion here and the things which do not. But in the minute book, for instance, which comprises most of the exhibits marked for

identification, they are captioned with [711] headings, like "California Litigation," or "Attorney Fees," and the like, and I have been careful to note that all of these matters which have been offered came under what the bank itself, or whoever these minute books belong to, have designated as "Attorney Fees," "California Litigation," and even where they have not specifically mentioned attorney fees in the caption in each one where they have mentioned California litigation or similar subjects they have discussed, or there has been a discussion, of the matter of attorney fees, the payment of them, the amounts, the status of the litigation, the reasons for allowing attorney fees and the like. So it seems to me that they certainly are material and competent.

On the exhibits which have been taken from the exhibit books, which are a portion of the minutes which are—well, they have been described variously from time to time—in other words, the minute books are LA-300 and the exhibit books are LA-91, LA-87, etc., and each one has items which on their face pertain to the matter of attorneys fees.

In the matter of Exhibit 56 for identification and LA-87—before discussing that, however, I will say that Exhibit No. 57 for identification, being page 91 and others from LA-52 of the minutes of April 8, 1946, that they fall within the same category of those that I have been discussing.

Exhibit 56, the stockholders meeting, being pages 33 to 49—— [712]

Mr. Chapman: Those bear on the question of estoppel, your Honor. I think it is apparent from

at least the first two stockholders meetings, particularly the one in 1946 and the one in 1947, that Portland didn't like being merged and were objecting to it, and Los Angeles said they never had been swallowed. The last two deal with attorney fees, the litigation and proceedings.

The Court: To segregate the items which are not material and rule on them word by word or sentence by sentence, I do not think is expected of even the lower courts, within which category I fall. It is sufficient to indicate that there are material things which deal upon this subject within these minutes, that is to say, No. 56, pages 33 to 49 of LA-87, and that there is not anything in these minutes which would come within the ruling under which the court has heretofore in this case excluded minutes or other documents or evidence kept by any of the defendants. That is to say, there is nothing in there of a confidential nature or which would injure the public interest if made public.

Therefore the objections are overruled, and Exhibits 34 to 57 inclusive are admitted in evidence.

(The documents referred to were received in evidence as Joint Petitioners' Exhibits Nos. 2-27-50-34 to 2-27-50-57 respectively.)

Mr. Angell: If the court please, we are endeavoring to find our answer to the motion of July 6th. We know we filed [713] an answer and we are certain it is verified and we haven't been able to locate it.

While they are looking for it, your Honor, I

might ask the court, in view of the fact that they are offering these motions again which are already in the pleadings and a part of the record, I want it clearly understood that it is not necessary to now again offer in connection with this motion for attorney fees the following documents:

Application for motion to impound the promissory note of the Long Beach Association, together with the \$6,300,000 collateral security, the answer and objections that were filed thereto and the order of impound made thereon, and the motion to set——

The Court: I do not quite follow you. You want to be sure about what?

Mr. Angell: That these are to be considered in evidence and to be available for consideration in connection with the motion for attorney fees that is here being presented. These are all pleadings in the case.

The Court: In so far as the entire files and records in this case are concerned, the court may take judicial notice of them.

Mr. Angell: We will offer those in evidence in connection with this motion to make sure they are in. May I have those documents? [714]

The Court: May you have them?

Mr. Angell: Yes. I would like to have them so I can give the dates and the numbers.

The Court: If you will give us the date we will get the documents.

Mr. Angell: I do not have them, your Honor. The motion to impound the funds, which was made,

as I recall, in early 1948. I was not in the case then. Do you have it, Mr. Bishop?

Mr. Bishop: Your Honor, the document which Mr. Angell is referring to was filed in this court on August 24, 1949, and is a verified return to the order to show cause re the dissolution of our bank.

The Court: No, he was referring to something else, Mr. Bishop.

Mr. Bishop: Then I don't know what he is referring to.

The Court: He is referring to a motion to impound.

Mr. Bishop: No, he wasn't.

The Court: Then I do not understand the English language.

Mr. Works: Your Honor has stated several times that you will take judicial notice of everything in there files. That means that these gentlemen can argue from any document they want to.

The Court: Of course it does. [715]

Mr. Angell: That is all we wanted to be sure of.

The Court: As a matter of fact, you can even take the Constitution of the United States and argue from that because I take judicial notice of it.

What time do you want to start in the morning?

Mr. Bishop: Your Honor, to keep the record straight, I think we have all kept pretty good notes about the exhibits that are to be photostated, and I would like the permission to withdraw from the clerk's possession—I think there are two documents that were taken out of these boxes tonight, and be-

fore anybody forgets where they belong I would like to get them back in.

The Court: I only saw one.

Mr. Bishop: How many were there, one or two?

Mr. Chapman: My memory is that we only used one out of the box. It was a hotel bill.

Mr. Bishop: Just the one then.

Mr. Chapman: These are going to the special master for reproduction, I understand.

Mr. Bishop: That is correct.

Mr. Chapman: I would like to have you communicate to him—I think you may see him before I do, he being in your office—that I would like an extra copy photostated of everything that goes into evidence here so that we can take it down to Long Beach and get it into our files. In other [716] words, I want him to make two photostats.

Mr. Bishop: So we may have an understanding, Mr. Chapman, and we don't destroy the record already made, you are willing to pay for the two photostatic copies, one for the court and one for yourself?

Mr. Chapman: That is right.

Mr. Bishop: Then I will further stipulate that before they are released from the special master they must be checked and approved by Mr. Chapman before filing.

Mr. Chapman: That will be fine.

Mr. Bishop: Thank you.

The Court: Mr. Stacey, will you just hand me all those books you have on your desk?

The Clerk: Yes, your Honor.

(The volumes referred to were passed to the court.)

Have you taken any exhibits out of these books on the table?

Mr. Bishop: No, sir.

The Court: Will you look at them, Mr. Chapman? I want to make an order here, a very short one, that will dispose of them.

(Counsel examining volumes.)

Mr. Westover: I don't know whether your Honor is aware of it or not, but many of these books have under the discovery proceedings been examined only for the purpose of these [717] attorney fees, not for the general discovery proceedings as yet.

Mr. Bishop: Your Honor, I don't propose to take these away tonight. They will be here in the morning.

The Court: I understand.

Mr. Bishop: I just wanted whatever was back in its right place.

The Court: If you will just give me all the books from which you have read tonight or offered anything in evidence.

Mr. Chapman: Mr. Westover kept a list.

The Court: LA-87 is the black book. LA-52——

Mr. Westover: LA-52, there were matters in that.

The Court: Yes.

LA-95.

Mr. Westover: There were matters in LA-95-A, book. That is the way it is designated.

The Court: LA-95-A, book.

LA-96.

Mr. Westover: In LA-96 there are matters.

The Court: LA-97 and LA-98.

Mr. Westover: LA-97 and LA-98.

The Court: And LA-300.

Mr. Westover: And LA-300.

The Court: And that is all.

Mr. Westover: May I just check it? [718] LA-90——

The Court: Where is LA-90?

Mr. Westover: It is a separate book. Mr. Chapman has it here.

The Court: May I have it?

(The volume referred to was passed to the court.)

The Court: LA-95, LA-96, LA-97, LA-98——

Mr. Westover: There were matters out of LA-96 and out of LA-97, there were matters out of that.

The Court: LA-52.

Mr. Westover: LA-52, there are matters out of that.

Mr. Chapman: Were there any out of LA-51?

The Court: Nothing in LA-51.

Mr. Chapman: How about LA-59?

Mr. Westover: No, I don't find anything in that in my list.

Mr. Chapman: LA-99, I don't remember whether there was anything in that.

Mr. Westover: No.

The Court: No, I do not recall it.

Mr. Bishop and gentlemen, with relation to the matter of copying the books and records, LA-52, which has been described in the record as that number and from which there have been pages admitted in evidence, and the same is true of the following documents, LA-87, LA-95, LA-96, LA-97, LA-98 and LA-300, all of the items which have been admitted in evidence [719] from these documents, which appear to be records of the defendants, will be photostated under the following terms and conditions:

The records will be returned to the custody of the special master from whom I understand they were received in this proceeding and by him received in connection with the discovery proceedings;

That they will be photostated, in so far as they have been admitted in evidence by the respective exhibit numbers, and the photostats will be forwarded to the clerk of this court and thereafter they shall be returned and kept in the custody of the special master subject to his, or in connection with the, discovery proceedings.

That is to say, in so far as the proceedings in this matter are concerned, they are now released and are subject only to the orders of the special master in connection with the discovery proceedings.

Is that clear?

Mr. Bishop: Well, your Honor, we would like one more order, if it is possible, and that is that as soon as the photostats have been completed—and Mr. Noon requested me to particularly do this—that the last minute book and the last exhibit book im-

mediately be released for return to San Francisco, subject to further call of the special master.

The Court: That is just what I tried to say, that as [720] far as this court is concerned, upon compliance with the order which I have just made, the originals are released in this proceeding; they are produced here from the special master, the special master can order them returned or whatever is going on in the special master's proceedings.

In so far as the exhibit identified here as 2-27-50-33, I do not think that the San Francisco Bank, or the purported or reported or alleged San Francisco Bank, is going to go out of business if this document is not returned to their files. It can remain with the clerk, and if counsel want to substitute a photostatic copy they can produce it or pay for it with the clerk.

What next?

Mr. Chapman: In connection with that order, your Honor, can an extra set of photostats be made? I think I only ordered one, and in trying to keep up with this record we have learned to get extra copies.

The Court: Anybody who wants extra copies of the photostats can secure them from the special master. As far as I am concerned, I am ordering a photostat here in the clerk's office in lieu of the originals and permitting them to release the originals upon substitution of the photostats. There is no objection to any party to this litigation securing photostats of what has been admitted in evidence here.

Mr. Bishop: To expedite the photostating, I would [721] appreciate it if counsel who are here present tonight would indicate if they desire to make any designations other than Mr. Chapman has asked for a copy of all of them so that we can have it done once and don't have to send the books back to the photostaters, or we will never get those two books back to San Francisco.

The Court: All they have to do is make an original and then they can make copies from that.

Mr. Bishop: That isn't the way it works out down there, your Honor.

Mr. Works: If you want a vote on it, we will pass.

Mr. Bishop: Does anybody else want any copies?

Mr. Gilbert: I would like copies.

The Court: This is not free, you know.

Mr. Gilbert: I know that.

The Court: Very well. Then that is settled.

Now has anybody else any evidence to offer?

Mr. Angell: We are trying, your Honor, to ascertain if we could get a stipulation here with regard to the question of whether or not, in connection with these figures submitted in Mr. Gregory's affidavit and offered in evidence, the portions read by Mr. Works, whether in computing the percentage of stock which voted on the various propositions, any ballot had been sent to the United States as an owner of stock in the San Francisco Bank. I do not know whether we [722] can stipulate or whether we will call Mr. Gregory and ask him.

Mr. Works: I am willing to stipulate that no

ballots were sent to the Government. I am not willing to stipulate that the Government was a stockholder. As I understand it, all they have is some kind of a receipt, whereas the member associations do have stock certificates.

Subject to that, and subject also to an objection of irrelevancy, I will so stipulate.

The Court: Yes, I looked at the stock books and I do not recall seeing any certificate issued to the United States.

Mr. Works: I am willing to stipulate, subject to an objection of irrelevancy, that no ballots were sent to the United States Government.

Mr. Angell: I think Mr. Works' statement is correct, subject to checking the answer or the fact if it becomes material, that no actual stock certificate is issued by the San Francisco Bank to the Government but a receipt is issued.

The Court: You mean to the Government or any officer or agency of the United States Government?

Mr. Angell: That is correct.

Mr. Chapman: Including the Reconstruction Finance Corporation?

Mr. Angell: I think that is correct.

The Court: Including any officer or agency of the [723] United States Government, I take it, would include the Reconstruction Finance Corporation.

Mr. Angell: Yes. And the receipt is given to them for the purchase price for the number of shares of stock that they are entitled to.

Mr. Works: Subject to what has been said, we

Now is everybody through?

Mr. Gilbert: Yes, sir.

Mr. Works: Yes, sir.

Mr. Chapman: Yes, sir.

The Court: The movants, O'Melveny & Myers, Mr. FitzPatrick and Mr. Gilbert rest?

Mr. Gilbert: Yes, your Honor.

Mr. Works: Yes, your Honor.

Mr. Chapman: I rest.

Mr. Westover: We rest.

The Court: Title Service Company, do you rest?

Mr. Sutter: We have nothing. We rest.

The Court: The official defendants rest? [726]

Mr. Fitting: We rest.

The Court: And the San Francisco Bank rests?

Mr. Bishop: We closed at noon today.

Mr. Angell: We rest.

The Court: Very well.

Now on the matter of argument, what are counsel's notions concerning the order of argument? I take it that the movants have the burden.

Mr. Works: Mr. Gilbert and I have discussed that matter, and if it is satisfactory with your Honor I will open and Mr. Gilbert will follow.

The Court: How long will you want?

Mr. Works: Your Honor, I am not much of a talker. I think 45 minutes would be ample for me, probably less.

The Court: When you say 45 minutes, that is quite a while to talk.

Mr. Works: If your Honor will limit me to 30 minutes, I think I can finish.

The Court: Here is what I am thinking of. I am just wondering actually what the issues are here to talk about. Is there any question or can there be any question from the evidence in this case as to the value of the services rendered, that is to say, assuming all the other factors being equal?

Mr. Works: I don't want to argue value at all, your [727] Honor.

The Court: Do the gentlemen on this side of the table?

Mr. Fitting: I was not planning to argue value, your Honor.

The Court: Well, then, what are you going to argue about? Who pays it and whether or not the court has the power to order it?

Mr. Works: That is all, and to point out——

The Court: Wherein does the power of the court differ in connection with your application for attorney fees and the application for attorney fees heretofore allowed, in so far as power is concerned?

Mr. Works: There is no difference at all. We are advocating a somewhat different theory, namely, that applicable to a corporation that is opposing a receivership or dissolution and whose assets have been taken away from it, that line of cases. It is side by side with the complaint of the trust fund theory, due process, right of a corporation whose assets have been taken away to have its day in court to defend itself out of funds seized.

The Court: Let me see. You are representing the corporate body if anything was left of it?

Mr. Works: That is correct.

The Court: And the class?

Mr. Works: There are two aspects to it. [728]

The Court: As the shareholders of that corporate body?

Mr. Works: There are two aspects to it, yes, your Honor. Mr. Gilbert's client and our five member associations are in exactly the same position. The Bank, in my thought, is in an even stronger position because of the holdings in the cases that a situation where a corporation has had its assets taken away, it has a due process right to the use of those assets in the hands of a receiver or other custodian to defend itself.

Now in this case you go a step further, the commissioner didn't take over the Los Angeles Bank himself, he didn't appoint a conservator, he did transfer the assets to what we regard as his creature and agent, the San Francisco Bank.

The Court: The Portland renamed the San Francisco Bank?

Mr. Works: Yes, formerly known as.

The principle for which we contend in our view has precisely the same application as if our funds had been placed by Mr. Fahey in the hands of some other creature of his, namely, a conservator. That is the line of argument we are going to take.

The Court: Very well.

Mr. Works: And we are going to point out to your Honor that both our action and our cross-claim are brought in rem, they are actions to remove clouds either under Section 57 and to recover

possession, that in and by these actions we have [729] brought within the jurisdiction of this court not only the funds impounded in this court but every stick of property which the San Francisco Bank holds and which it obtained by certain means from us.

It is our position that that is the fund which it is the duty of the directors of the Los Angeles Bank to defend, first, in rem jurisdiction as to all and, second, the San Francisco Bank is found within this district. Your Honor has jurisdiction in personam of the San Francisco Bank in this very case, and it is our view that your Honor has jurisdiction to make an award direct from the San Francisco Bank to the Los Angeles Bank if you care to. We have petitioned for an allowance out of the funds deposited in court or, as your Honor may otherwise direct.

I am merely indicating my views on the matter.

The Court: Very well. I see your position. And you want about 45 minutes?

Mr. Works: I don't think I will need that long now. I have pretty well argued the matter.

The Court: I may want to ask you some questions.

Mr. Works: I was making some allowance for that, your Honor.

The Court: I see.

Mr. Works: The rule we invoke is that set forth in *Anderson v. Great Republic Life*, which I think has undoubtedly [730] been cited to your Honor, *Eggert v. Pacific States*—that was a case

which I happened to be quite familiar with, where Judge Henry Willis imposed jurisdiction in personam upon the California Building & Loan Commissioner and made him pay over in a decision where Pacific States defended in a case where the Commissioner was disqualified. I will also have something to say about the Eggert case.

It has got to be that way, your Honor, because otherwise a public officer by the simple expedience of confiscating a home loan bank's assets could simply hamstring it from ever defending itself. That is the position we take as far as the Bank is concerned.

I hadn't intended to duplicate Mr. Gilbert's argument as to the position of the six associations, his one and our five.

The Court: I am not asking you to make your argument now; I was trying to get at what you were going to argue about.

Mr. Works: I have given a pretty good outline of it just in these few minutes, your Honor.

The Court: Yes, very well. And you say it may take you 45 minutes to develop that?

Mr. Works: Yes.

The Court: How long do you want, Mr. Gilbert?

Mr. Gilbert: No longer than that, your Honor.

The Court: You mean no longer than his 45 minutes? [731]

Mr. Works: I think I can do it in less time, your Honor.

Mr. Gilbert: Thirty minutes, perhaps.

The Court: And you do not want to argue at all, Mr. Chapman?

Mr. Gilbert: Yes, he does.

Mr. Chapman: Your Honor, I would like to come in last, if I can, when everybody is tired out and I know I will have to do it in probably 15 or 20 minutes. But we have a position to take, and if we may have just a few minutes I would like to explain it. We were taken over in the first place and we managed to get our attorneys some attorney fees twice, with a fight each time, and we are now threatened to be taken over the second time, still fighting for the Los Angeles Bank. We are quite interested in seeing the Los Angeles Bank get enough attorney fees to do some effective fighting for itself. It might help save some of our hide.

The Court: How long will the Government want?

Mr. Fitting: Not longer than 10 or 15 minutes, if the court please.

And in connection with Mr. Chapman's argument, I think he should speak with the moving parties.

Mr. Dusenbery: We will want some time, your Honor, to answer Mr. Works' argument. We take a little different view of the fund principle of law involving this question now before [732] the court than Mr. Works does.

The Court: From your point of view, will your argument be directed to the question of argument?

Mr. Dusenbery: I think it goes to that question, your Honor. I will try to keep it within that framework.

The Court: How long will you want?

Mr. Dusenbery: I think it can be developed in 30 minutes, perhaps less.

The Court: Shall we start then about 9:00 o'clock in the morning?

Mr. Works: Your Honor is writing the ticket, as the saying goes.

The Court: I do not want to keep you here all day tomorrow but if counsel are going to use up the time they have expressed, 30 minutes, 30 minutes, 30 minutes, 30 minutes—that is two hours.

Mr. Angell: I wonder if we started at 10:00 o'clock if we couldn't finish by noon. Probably we won't argue as long as we think.

Mr. Chapman: That will be the first time that happened.

Mr. Angell: It is pretty late now, your Honor.

The Court: Very well. We will recess until 10:00 o'clock tomorrow morning.

Mr. Chapman: Before you leave, your Honor, I want to say just one more word. We kept you here until 11:00 o'clock and [733] I want you to know that I tried for a solid month to get this done in daytime hours.

The Court: Let us not start another argument.

Mr. Chapman: That is in the form of an apology for keeping you here until 11:00 o'clock at night.

The Court: Recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 11:20 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Saturday, April 8, 1950.) [734]

April 8, 1950; 10:00 A.M.

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: Are you ready to proceed with the argument?

Mr. Works: Yes, your Honor.

ARGUMENT IN BEHALF OF THE LOS ANGELES BANK

The Court: I read the Eggert case and the Ferguson case, and I understood you to say last night that they supported a proposition that this court should award fees and assess them against the funds now in the hands of the San Francisco Bank.

Mr. Works: On the in personam series which was set forth in the Eggert case; yes, your Honor.

San Francisco Bank is in this position, that it was personally served and brought into these actions. It is here, there is no question about that, in personam.

The Court: And it is authorized to sue and be sued under the Federal statutes?

Mr. Works: Yes, your Honor.

The Court: Authorizing its creation and operation?

Mr. Works: Exactly.

Our position, your Honor, is that your Honor has in rem jurisdiction over all of the assets which were, let us say, taken from Los Angeles to San Francisco. Your Honor also has [737] in personam jurisdiction over San Francisco.

The Court: To order it to do a personal act?

Mr. Works: Exactly, to compel it to obey the mandates of the court of equity.

The Court: Concerning the property in rem?

Mr. Works: In rem; exactly.

The Court: The case supports the proposition that a corporation, even though it may be a public corporation, may be sued in personam?

Mr. Works: I don't think there is any question about that, your Honor. They are a corporation entitled to sue and be sued just like anybody else, whether they partake of a public nature or not. They have no greater standing at any time than a national bank and they are sued all the time.

The Court: These funds in the Eggert case were not in what corresponds to our registry of the court; they were in the hands of the State Building and Loan Commissioner.

Mr. Works: Exactly.

The Court: Who was——

Mr. Works: Who was a neutral in that case.

The Court: He was in possession of them as a liquidator.

Mr. Works: Exactly. He had been engaged in liquidating Fidelity for a number of years and he was in possession of the assets of Pacific States at the time while an action was going on San Francisco wherein Pacific States was trying to get [738] the assets back, but the Commissioner had them all on both sides. He intervened in the Eggert case and Judge Willis held, and the District Court of Appeals affirmed, that he had in personam jurisdiction to compel the Commissioner to disgorge.

I might say, your Honor, in that connection Judge

Henry Willis wrote an opinion in the lower court which expresses exactly the theory we have in mind and which we are discussing now.

The Court: Was that reported?

Mr. Works: It is not reported, but it is in the files of that case. However, it does state exactly the position which we maintain here, and I would like to adopt Judge Willis' views as our own in this case.

The Court: Do you want to file it as part of your brief, or is that your last copy?

Mr. Works: No, we have other copies. I thought I might read it, if I may.

The Court: Very well.

Mr. Works: "I am satisfied that this court, sitting as a court of equity in this case with all the powers of a court of equity at its command, has the inherent power to fix and allow the compensation of attorneys for the Pacific States, and to order the payment thereof as a preferred claim [739] by the Commissioner out of the assets of Pacific States now in the possession and exclusive control of the Commissioner, of whom this court has jurisdiction in re personam.

"It was the general duty of the Pacific States as a corporation, and of its officers, to take all reasonable means for the protection of the interests of the corporation and its stockholders and investment certificate holders against the claims and demands of the plaintiffs in this case. (Dingwall v. Seymour, 91 C. A. 483). This was a continuing duty after the takeover of March 4, 1939. This duty was dis-

charged herein in good faith and the defense against plaintiffs' claims was based on reasonable grounds. And, in the exercise of what appears to be a sound discretion in view of all the facts and circumstances in this case, the expense and compensation of defendant's attorneys should be ordered paid out of its assets over which it now has no control. (Citing cases.)"

The Court: What cases?

Mr. Works: Goodyear Tire & Rubber Company v. United Motor Company, 103 Atl. 471; Anderson v. Great Republic Life Insurance Company, 41 C. A. (2d) 181.

Judge Willis then went on to say: [740]

"The Pacific States, as defendant, had the constitutional right to be represented throughout the trial and proceedings by counsel of its own choosing, notwithstanding the takeover and intervention by the Commissioner, and its duty to pay the reasonable value of their services is established by fundamental law. And it lies within the jurisdiction of this court, in which such services were rendered, to fix and order paid the value thereof, and it becomes the duty of the court so to do if, in the exercise of a sound discretion under all the facts and circumstances of the case, it clearly appears just and equitable that such order be made. (Citing Anderson v. Great Republic Life Insurance Company, *supra*.) Otherwise, Pacific States would be 'hamstrung' in any effort to defend itself, as said in the Anderson case."

Now I will refer to the Anderson case a little later, if I may. But those views expressed by Judge

Willis in the trial court stage of the Eggert case express exactly the views which we have here.

The rule is simply that where the resistance of a corporation to receivership or dissolution proceedings—that is where we are—is made in good faith and on reasonable grounds that allowance of attorney fees to it out of the [741] funds in the possession of, say, a conservator or a receiver, may be made where, as I say, the defense is made in good faith and on reasonable grounds.

The Court: The fact that the Pacific States was in a long process of liquidation or dissolution by the State Building & Loan Commissioner does not, or does it, distinguish the fact that the dissolution and liquidation of the Los Angeles Bank was instantaneous.

Mr. Works: I hardly think the time element is important, your Honor. The principle, to my mind, is exactly the same. Under the act Mr. Fahey could have put the bank in the possession of a conservator. Now instead of doing that he saw fit, by these three magic orders——

The Court: If he had had lawful grounds.

Mr. Works: Yes, of course. I am simply talking about the power under normal circumstances.

Now instead of doing that, by these three magic orders which we have heard so much about he simply transferred the assets to his creature and agent, the Portland Bank. And your Honor will bear in mind that the Portland Bank never paid a dime for those assets, not one dime.

The Court: The minutes yesterday I recall recited that the board of directors of neither the Portland Bank nor the Los Angeles Bank had any meeting, or the stockholders, nor ever voted [742] on it.

Mr. Works: Exactly. It is purely a creature situation. That is the point I am trying to establish, your Honor.

The Court: Let me see now. One of the three orders said that the Los Angeles Bank is dissolved.

Mr. Works: Order No. 3, I believe.

The Court: Yes. It is dissolved. That is the short of it.

Mr. Works: Yes.

The Court: That was the order creating or transferring the assets.

Mr. Works: Yes. The order making two states into one state, as I recall it.

The Court: Where are those three orders?

Mr. Works: I have them in my briefcase.

The Court: They are all set forth in some order here.

Mr. Chapman: They are in your preliminary injunction.

Mr. Angell: They are pleaded in the Long Beach complaint.

Mr. Chapman: I think we should take those that are in the pleadings, Mr. Westover. They are certified by Mr. Ammann.

Mr. Gilbert: I have a copy of them in the footnote here.

The Court: Of the three of them?

Mr. Gilbert: Yes, I have copies of them in the footnote.

The Court: This is in the injunction [743] order?

Mr. Gilbert: Yes.

(The document referred to was passed to the court.)

The Court: Mr. Works, there is a provision in the statute with relation to the Home Loan Bank Board, Federal Deposit and Insurance Corporation, is there not, that the Federal Deposit and Insurance Corporation shall be appointed a liquidator?

Mr. FitzPatrick: That is with reference to Federal savings and loan associations, your Honor.

The Court: What is this?

Mr. FitzPatrick: A Federal home loan bank.

The Court: What is the difference?

Mr. Works: There is a conservator power as regards the home loan banks in any event, your Honor. But instead of doing that, the commissioner, for reasons of his own, threw the assets into Portland without any consideration being paid by anybody, without action being taken by either board of directors, the result being that the San Francisco Bank at the present time is simply a constructive trustee of our assets, which gives your Honor another ground of equitable jurisdiction.

The Court: Very well. You were coming to *Anderson v. Great Republic Life*.

Mr. Works: Yes.

The rule and the reason for the rule is about as well [744] stated in that case as any.

“It is a general rule that where an application has been made for the appointment of a receiver for a corporation, attorneys’ fees and expenses in resisting such application, if made in good faith and upon reasonable grounds, may become a valid claim against the receiver.”

Or, as here, one who stands in the shoes of a receiver or conservator, namely, the San Francisco Bank.

“Whether such attorneys’ fees and expenses are to be allowed rests in the sound discretion of the court, in view of all the facts and circumstances.”

And there the court cites a note in 89 A. L. R. 1531, which I have here if anybody wants to refer to it.

“If allowed, the question as to the amount thereof is likewise addressed to the sound discretion of the court. The claim of the officers of a corporation or of attorneys employed by them to be paid out of the funds in the hands of the receiver is not an absolute right, but it is entirely in the discretion of the court administering the fund to determine, first, the good faith and justification of such application, and, second, if warranted, the amount to be allowed. (Citing *Esarey v. Pierson*, 84 Ind. App. 109 (141 N. E. 87.)) ‘Even if [745] it turns out that a case is made for the interference of the state, so long as the defense was made in good faith and upon reasonable grounds, there is apparent

justice in subjecting the property and fund involved in the litigation to expenses incurred in discharging a general duty cast upon the corporation and its trustees, to take all reasonable means for its protection.' "

The Court: What was the duty on the conservator—not the conservator, I do not know what you would call it—the dissolution was instantaneous and its liquidation of the Los Angeles Bank. All the assets were transferred to the San Francisco Bank. Now what was the duty there? This points out that if there was a duty on the part of a receiver, liquidator or conservator then attorney fees may be allowed to one who compels the performance of that duty.

Mr. Works: The duty, your Honor, if I may say so, runs the other way. The duty lies upon the directors of the Los Angeles Bank to resist such a seizure by every means at their power, which includes the institution of litigation for that purpose. That is the duty which is being referred to here.

The Court: I see.

Mr. Works: It talks about "subjecting the property and fund involved in the litigation to expenses incurred in discharging a general duty cast upon the corporation and its [746] trustees, to take all reasonable means for its protection." And it cites *People v. Commercial Alliance Life Insurance Company*, 148 N. Y. 563, 42 N. E. 1044.

In other words, if your Honor please, the directors of the Los Angeles Bank owed a fiduciary duty to their members to do everything in their power to

right this wrong. That is the kind of a duty which these cases talk about.

The Court: I see your point.

Mr. Works: Now the main objection raised here, as I see it, it is said that an interim allowance is not warranted because——

The Court: Just a moment, while I am still on this subject. Your theory is that there can be no distinction then between a conservator, liquidator, building and loan administrator and a sucessor?

Mr. Works: Exactly, especially where you have a successor who takes without consideration of any sort. That just makes it more apparent.

The Court: And instantaneously without opportunity for the board of directors of either corporation or their stockholders to be consulted or to express themselves, or the officers?

Mr. Works: Yes, your Honor. The greater vice of the instantaneous situation is that it is an attempt to deprive us of our day in court so that five minutes after this [747] instantaneous action occurs they attempt to claim that we have no status to sue because we are no longer alive. That simply points up the vice of such an instantaneous transfer as this, and it may give some indication as to the reason why that method was attempted. But that is a matter of interest from the general evidence.

The Court: I see your position.

Now you were moving to another point?

Mr. Works: I was going to say, your Honor, that one of the main grounds of objection here raised by our friends on the other side is that an

interim allowance may not be allowed, so they say, because an allowance of fees just depend upon success in the litigation.

Now the answer to that is that success, ultimate success or failure, has nothing whatever to do with the rule which we invoke.

The Court: I do not think that you need to spend any time on that, counsel. That point has been extensively argued and thoroughly briefed in connection with application for fees heretofore made. As a matter of fact, I recall in one of the briefs—I cannot lay my hands on it at the moment—a chart was prepared showing allowance of fees where they were interim and the litigation failed, where they were unsuccessful.

Mr. Chapman: Do you want me to find [748] that?

The Court: Yes, if you will.

Mr. Works: I was simply going to point this out, your Honor: The Eggert case is the star example of that type. That case was well lost. I lost it myself personally, and the liability was \$3,500,000. So success has nothing to do with it. The issue is, as I have said before, whether the resistance is made in good faith and on reasonable grounds.

Now our complaint in the Los Angeles action and our cross-claim in the Long Beach action each show on their face that the action and cross-action are brought in good faith and on reasonable grounds. They directly charge wrongful acts upon the part of the administrator.

In addition to that, late last evening we intro-

duced the petition of July 6, 1948, which showed that over two-thirds of the present stockholders of the San Francisco Bank were in favor of a return of the assets to the Los Angeles Bank. I am not going to labor this point. That is a matter for your Honor to decide on all the evidence in the case, whether the action and cross-action were instituted in good faith and on reasonable grounds.

We submit, with all deference, that there can only be one answer to those questions, and that is that the action and cross-action were so instituted and are so being maintained to right a wrong. That doesn't mean that your Honor has to decide a single question on the merits of this case, [749] not one. The case can be decided either way. The only question is, are these actions being prosecuted in good faith and on reasonable grounds, and we submit that they are. We are perfectly willing to leave that question to your Honor's decision as a chancellor sitting in equity.

Now I have already given my views as to the source of the award, in rem jurisdiction over all, in personam jurisdiction as to the bank to compel it to do whatever your Honor sees fit to order.

Now I touched a moment ago upon another claim of our friends on the other side. They say, first, that the Los Angeles Bank having been dissolved had no power to employ attorneys and, second, because of such asserted dissolution the receivership rule doesn't apply.

The Anderson case answers that contention very

fairly also, and I would like to refer to it briefly for that purpose if I may.

“One of the arguments advanced by appellants should not go unnoticed, because of the implication therein. Appellants argue that since respondent was employed after the insurance company had been restrained from transacting any business or disposing of any of the assets and since the commissioner was appointed conservator of the insurance company shortly after respondent was so [750] employed, the insurance company lacked the capacity to contract and it likewise lacked the capacity to impose a lien or charge upon the assets in the custody of the conservator by authorizing an attorney to render services to it. If such an argument were valid, the result would be obvious. An insurance company proceeded against by the commissioner would be hamstrung in any effort to defend itself, the hands of its directors would be tied and there would be no effective recourse from unwarranted official action. If this were the case the effect would be to deny the company the right to counsel and hence to due process of law. Since in such a proceeding as this all the funds of the corporation are placed in the hands of the conservator, an arbitrary denial to the corporation of the use of any portion of such funds to pay attorneys' fees amounts to the same thing as a denial of the right to contract for the services of an attorney, the effect of which would be a denial of the right to defend at all.”

I think that completely answers our friends' argument in that regard.

Indeed, your Honor, I think it is quite evident that their argument in this regard proves too much. It must [751] necessarily be the thesis of the other side that an administrative officer may rely or wrongfully destroy a financial institution and then by the simple expedience of confiscating its assets utterly prevent a judicial review of the official's action.

The Court: I think that is the position of the defendants.

Mr. Works: I think it is too. And there is such a thing as due process under the Fifth Amendment.

The Court: That this court has no power, that the Board, either acting as however it was constituted, one man or more, had absolute power over these various associations without any right to court review.

Mr. Works: In other words, that the Commissioner or the present Board are judicially untouchable. That must be their position.

The Court: Also witnesses, according to the rule which I read down there one day at the discovery proceedings. If they tell a witness he cannot testify, he cannot testify.

Mr. Works: I remember that one.

Now other grounds of resistance to the application concern assertions of estoppel and acquiescence and whatnot arising out of dealings between the various associations and the San Francisco Bank. These assertions are met by a very common sense defense, it seems to me, that the San [752] Francisco Bank was the only home loan bank in the dis-

trict that any of these associations could deal with, and there are on record also protests as to the fact of their having been compelled to deal with the San Francisco Bank. There is in the record a vote of over two-thirds of the stockholders of the San Francisco Bank, indicating their desire that the Los Angeles Bank be restored.

On the merits, I don't think very much of the so-called defenses of estoppel and acquiescence. But there are two things I want to point out in that regard. First, these assertions of estoppel and acquiescence have nothing whatever to do with the Los Angeles Bank. They do concern the member associations. And, second, these assertions are matters, your Honor, which go entirely to the merits of the action and which may ultimately be tried by your Honor on the merits, but they have nothing to do with what is really a collateral proceeding such as this. They cannot ask your Honor to try this case now upon an interim application for attorney fees, and yet that is precisely what they are attempting to do, and if I understand your Honor's rulings yesterday that was the reason why your Honor struck out those affidavits, because they are attempting to have you try the case in advance.

The Court: I struck them out on the grounds which I stated for the record at the time.

Mr. Works: Exactly, and the record will [753] show.

Now we also represent five member associations who sue on behalf of themselves and all others

similarly situated. Originally there were six and Mr. Gilbert now represents one of them.

The Los Angeles Bank, by the very nature of things, also sues on behalf of its stockholders. That must be so. So your Honor has the feature of class representation here in addition to this receivership fund or doctrine which I have been talking about, the right of a corporation to defend itself even when its hands are ostensibly tied behind it.

Mr. Gilbert, as I understand it, will present the matter from the standpoint of the associations, and I will not attempt to duplicate his argument.

The Court: Mr. Works, is there any ground of distinction between the situation here and that existing in *Sprague v. Ticonic Bank* where the depositors sued the—I do not know what they called them—a receiver of a bank?

Mr. Works: I know what your Honor has in mind. One depositor sued and established by principles of *stare decisis* that claimants in 14 other trusts were likewise entitled to recover.

The Court: What I have in mind now, is there any distinction between the San Francisco Bank now having all of the assets which were held by the Los Angeles Bank and the receiver of the—I think there were two banks involved— [754] anyhow, the Ticonic Bank, who had in his possession all of the assets of the Ticonic Bank?

Mr. Works: I say that there is no distinction at all.

The Court: Except here there was an immediate liquidation, instantaneous dissolution. In other

words, if from the time of the adoption of the orders on March 29th there had been a conservator appointed or a receiver, and during that period of time this same lawsuit had been filed by the Los Angeles Bank or by the shareholders representing the class members, then your case would be squarely within the doctrine of the Eggert case, Winslow v. Ferguson, Sprague v. Ticonic Bank and the Anderson case.

Mr. Works: There is another one that is equally good along that line, and that is a Washington case where that precise situation happened. They applied for a receiver and for an order of dissolution there, but the corporation did have its day in court. The only effect of this immediate seizure, as I see, the immediate takeover, was to enable them to set up a smokescreen that the corporation no longer had power to defend itself. Now if that be a distinction as regards the Sprague case, it is a distinction in our favor.

The Court: Now you say there are two grounds, good faith and reasonable grounds.

Mr. Works: That seems to be the rule as laid down universally, your Honor, in cases of this [755] sort.

The Court: Of course they almost mean the same thing.

Mr. Works: I think so. A meritorious lawsuit, whether you ultimately win or not, a meritorious lawsuit to start with. That is the rule, as I understand it.

I might direct your Honor's attention to the

Washington case of *Watson v. Johnson*, 24 Pac. (2d) 592, where fees were allowed after the ultimate dissolution of the corporation, after the matter had gone through the courts of Washington, the fees were allowed to counsel for defending the corporation in that proceeding.

They lost. The corporation was finally dissolved. But the fees were awarded to the attorneys after the dissolution upon the very principles which I am discussing here.

I mention that because there was a situation where there was an orderly procedure. It was an application for receivership and for an order dissolving the corporation. The corporation appeared. They went through the courts of Washington. The Supreme Court of Washington finally affirmed the lower court's order of dissolution. The corporation was then legally dead. Nevertheless an application for attorney fees for services in giving the corporation its day in court was made and was affirmed by the Supreme Court of Washington in this case. It falls into the same general pattern.

Now I think I should explain our views, your Honor, to the situation here as regards our representation of both the [756] Bank and the five member stockholders. It is our feeling that everything done for the Bank enures directly to the benefit of all of our stockholders, not one or two or five, but all of them. And it is our feeling also that an award to the Bank would take care of any and all services which also enured to the benefit of the member corporations.

The Court: In other words, that Mr. Gilbert should not have any?

Mr. Works: No, I don't mean to say that, your Honor, at all. I am saying that as to the five associations whom we represent.

The Court: Whom you still represent?

Mr. Works: Whom we still represent.

The Court: You are not contending that any one of the individual associations did not have their individual right to secure counsel in an effort, as Sprague did in the Ticonic Bank case?

Mr. Works: Of course not. I am simply saying this, your Honor: Everything we have done in this case for the Bank has enured to the benefit of those member associations, and I am simply saying that to avoid a doubling up of fees for doing the same work it is our feeling—your Honor may not agree with us—that an award to the Bank would also cover any and all services rendered for the associations.

Now Mr. Gilbert is not in that position at all because [757] he doesn't represent the Bank, he has been working for Wilmington and Wilmington alone, and I certainly don't want to have any implication here that I am saying that Mr. Gilbert is not entitled to compensation for the excellent services he has rendered the Wilmington association since he has been in the case. But I am just trying to make my point clear, that in our case the Bank and the five members, all or each, represent all the associations. The Bank represents them all. It has to.

The Court: "All" includes the Wilmington association, does it not, all associations?

Mr. Works: Your Honor, not where Wilmington severs itself from the representation and appears in its own behalf. Perhaps I should have made that distinction sooner.

The Court: Well, your point is you are not requesting an allowance to you for services rendered to the Bank, a separate amount for the services rendered to the five associations, as class members?

Mr. Works: That is right. Under our peculiar situation here I think an award to the Bank would take care of the five.

The Court: I would not waste any time on that. I did not intend to go into that.

Mr. Works: But in the case of Wilmington, they have severed themselves from the representation and appeared by [758] their own counsel and their own counsel is entitled to be compensated. It is as simple as that, it seems to me. However, I will let Mr. Gilbert express his own views.

Thank you, your Honor, for your patience.

The Court: Mr. Gilbert. [759]

* * *

ARGUMENT IN BEHALF OF THE OFFICIAL DEFENDANTS

Mr. Fitting: May it please the court, our first objection is, of course, to the allowance of any of these counsel fees on the usual jurisdictional grounds.

The Court: You filed a memorandum?

Mr. Fitting: We filed a memorandum.

The Court: I found that a while ago.

Mr. Fitting: It was filed.

The Court: September, 1949?

Mr. Fitting: No, we filed one on February 23, 1950. [772] That was specifically in response to Mr. Gilbert's motion, but it more or less incorporates and brings up to date our arguments on both matters.

The Court: I do not seem to have it here.

Mr. Fitting: Stated briefly, they are that members of the Board are indispensable parties to the action and the Board members have not and cannot be duly sued or served in these actions because they are not residents of California and have never been served in California.

They can't be served as non-resident defendants under 28 U.S.C. 1655 since the action is not one to enforce or remove a lien on property located within the state of California. And the relief prayed for cannot be granted save by decree in personam against the Board members. And that the Board members have never made a general appearance in the action or otherwise submitted to the jurisdiction of the court.

Further, that neither the Home Loan Bank nor its shareholders have any justiciable interest sufficient to maintain the action, that it is also an uncontested suit against the United States, that the

actions are a collateral attack on administrative orders complained of in the action, and that the matters involved in the administrative orders here are within the exclusive primary jurisdiction of the Home Loan Bank and the parties have failed to exhaust their administrative remedies. [773]

The Court: All of those matters I have heretofore ruled on, and I do not know that it would be necessary to pass on them in connection with this application for fees. In any event, I have heretofore ruled on them in connection with the whole litigation and my rulings will stand.

Mr. Fitting: Also our objection under the interpleader statute on the grounds that that statute does not justify this action.

We further contend that the awarding of any fees at this time is inappropriate, first, because there is no adjudication that any parties are entitled to prevail on any branch of this case, relying on the cases primarily cited in our memorandum starting on page 3.

The Court: *Sprague v. Ticonic Bank*, which I think holds to the contrary; *Thomas v. Pizer*, *Standard Lumber v. Interstate Trust*, and those on page 4?

Mr. Fitting: That is correct.

In addition, it would appear that the *Eggert* case is distinguishable. The case there awarded fees to an unsuccessful party taking into consideration all the factors in the case, and there again after the case had been terminated, so that all the factors involved in the litigation, all the questions, the

merits of those contentions, after they were argued was before the court. Even so, the Eggert case again is a liquidating case, and is a case contrary to the general [774] current of the Federal cases cited in our memorandum. Further, the Eggert case doesn't say that in a case where there was no jurisdiction in the court that attorney fees should be allowed.

We also urge that the court not rule on attorney fees at this time on a very practical ground, and that is, that there is an appeal pending which the Government is attempting to expedite and push along at the fastest pace possible which will determine, we hope, once and for all, the jurisdictional questions raised here. So that once that appeal is decided the court can be in a better position to know just how the case in this court stands.

The Court: Suppose it were decided in the appellants' favor, then under the Eggert case I still would have the right to compel the payment of fees, would I not?

Mr. Fitting: No, as I understand the Eggert case, that does not hold that you can award attorney fees before the end of the litigation.

The Court: But it held that if it ended wrong you could allow fees to the fellow who was on the wrong end.

Mr. Fitting: If taking into consideration all the factors in the case, all the facts developed, it appeared then to the court in the exercise of its equitable discretion that the fees should be granted. Certainly if any court is going to award fees to an

unsuccessful party, they should wait [775] until the end of the trial and do it so that they can have before them the entire litigation. We don't think that fees should be awarded to an unsuccessful party, and to determine whether a party is or is not successful we do have to wait until the end of the litigation.

The Court: The litigation such as this would end very suddenly because—well, unless some firm were in a position, such as Mr. Morrow described, where they were financially able to carry the burden of the case. If this were ordinary litigants and ordinary law firms the litigation would end on the first appeal because the lawyer probably, on the first appearance, because the client could not afford to pay the lawyer and the lawyer could not afford to work for nothing.

Mr. Fitting: There again, if the court please, before the court can decide whether anything of that sort should be awarded to counsel, it has to make a very basic determination as to the reasonableness of the entire litigation. Our objections go both to that, and to the legal authorities here cited.

Now on the question of the good faith and the reasonableness of the litigation, in the first place, one of the pieces of evidence relied on particularly, presented last night, was a petition filed on July 6, 1948, almost two years after the original suit was commenced on behalf of the Los Angeles Bank, presumably to show good faith at the time the litigation was [776] instituted two years before. That particular petition purports to show and recites that

more than 50 per cent of the voting power of the Bank was in favor of restoring the Los Angeles Bank two years after the action was instituted. That raises some serious questions concerning the power of the Bank, and I would like briefly to point out to your Honor just what the powers of the stockholders are in this bank and how again this case differs from all the other cases in that the bank is, in fact, a branch or arm of the Government.

In the first place, the only voting powers that the so-called shareholders in the bank have is the power to vote for directors. Each institution has one vote for each of four directors.

The Court: Is that not a pretty valuable power?

Mr. Fitting: It is a pretty valuable power.

The Court: In other words, is it not the equivalent of you deciding where you were going to put your money? In other words, you decide you are going to put your money in a bank across the street, or leave it to Mr. Reinos, who sells *El Tiempo* for seven cents every morning on the corner. You decide in favor of the bank. Now suppose the bank turned it over to *El Tiempo*, Mr. Reinos there, and he spent it. You would have lost control of your money.

Now by the same token, when the directors or the depositors of the money in the Los Angeles Bank determine whether [777] or not Mr. Reinos, who sells *El Tiempo*, is going to have charge of it or somebody who knows something about the business.

Mr. Fitting: Let me explain further the difference between this bank and the ordinary bank.

Eight of the directors are elected in that fashion, by institutions voting, not by stock ownership, but by membership.

The Court: I understand.

Mr. Fitting: One institution has one vote, so that this so-called plebiscite is meaningless from that point of view. In other words, your stock ownership depends on two things: to join the bank you have to have a certain stock ownership, and also the amount of stock ownership you need is also tied into the amount of money you buy from the bank. So as is frequently the case, the persons with the highest stock ownership are the persons that either in the past have or now have outstanding large loans from the bank. In other words, the people who owe the bank the most.

Four directors are selected by the Government. Those four are chosen by the Government. Originally the Government, as in this bank, the Government owned more than 50 per cent of the stock. There is a provision in the Act for that stock to be gradually retired until the Government stock is all retired, and in spite of that the Government would still retain its four public interest trustees. [778]

All powers of the bank under the statutes, Section 1432, and all acts done by the bank, are subject to approval of the Home Loan Bank Board, as is shown in these minute books that is followed where the budgets are approved, appointments of counsel—practically everything that the bank does is subject to the approval of the Board.

The Board can remove officers of the bank for cause.

The Court: The Board can?

Mr. Fitting: The Board can.

The Court: Or the board of directors?

Mr. Fitting: No, the Home Loan Bank Board. When I say the "Board" I mean the Home Loan Bank Board. The Home Loan Bank Board appoints the chairman and vice chairman of the directors. The bank counsel, as pointed out here, must be approved by the Board. The stock of the bank is transferable only to a limited extent, and it is not true stock.

In that connection, I would like to refer your Honor to Judge Roche's decision in *Peoples Bank v. Federal Reserve Bank of San Francisco*, 58 Fed. Supp. 25, page 30, where a similar question was raised as to stock in the Federal Reserve Bank. The judge there pointed out that it was not true stock in the common sense of the word, but it was more or less of an added security, so that these persons are not stockholders in the true sense of the word, they are persons that are given a limited participation in a bank which is [779] primarily a Government agency and runs——

The Court: They are members?

Mr. Fitting: They are members.

The Court: And they have a right to vote as a member, and each member's vote is equal regardless of the amount of stock he owns, regardless of the amount of money he owes, and regardless of the

amount of money which he may have on deposit with them for safekeeping.

Mr. Fitting: Correct. And he has a vote for four of the directors.

The Court: Eight.

Mr. Fitting: No—well, the members as a group elect eight directors.

The Court: I am speaking now about the members.

Mr. Fitting: I am talking now about an individual member.

The Court: He has a vote on eight directors.

Mr. Fitting: No, he has a vote on four members. There are four classes of directors elected by the institutions. There is one class of directors at large as to which each member votes, so each member votes for those two directors. Then the other six directors are divided into three classes, large, medium and small I think they are called, and the associations vote for the directors in their class, so if you are a large association you vote for two large directors and [780] two directors at large. So while eight of the directors are elected by the members as a whole, each individual member votes only for four of them.

The Court: I see your point.

Mr. Fitting: Now it is our contention for that reason we have this primary situation: You have, in effect, the Bank, an arm of the Government and controlled primarily by the Government, to carry out the financial policy of the Government.

The dispute here, to the extent that it is a dispute

between the Los Angeles Bank and the San Francisco Bank and the Home Loan Bank Board is, in effect, a dispute between groups that are primarily Government groups, a dispute which ordinarily is resolved solely in the executive department of the United States.

Ordinarily, where a dispute arises between two portions of the executive department the person that settles them, if they go high enough, is the President. He is the boss. And the executive department does not sue itself. It is our contention that that is primarily the situation that we have here.

I might also point out one inconsistency here as far as counsel is concerned. If they are correct in their contention that the Los Angeles Bank still exists, or has any existence, and that they represent the Los Angeles Bank, there [781] is a regulation, 122.70, which prevents any attorney from representing both the bank and any association without the consent of the Board.

The Court: There is a regulation which prevents the bank from having any attorney to represent them without the consent of the Board, did you not just tell me?

Mr. Fitting: That is correct.

The Court: And by that token no fees could be allowed. That is to say, counsel here for the plaintiff, Los Angeles Bank, have no legal standing at all under that theory.

Mr. Fitting: That is right. That is correct.

Now one further point, to the extent that this is

a class action, it is not entirely clear just who is the class. At one time the suit, you will recall, was as shown by the petition, since withdrawn from this case, the expenses were on behalf of a committee of the shareholders. Then that committee became a committee of a trade organization, namely, the California Savings & Loan League, so that it appeared to a certain extent this litigation is a litigation urged and brought on by a trade association rather than by a group of shareholders.

The Court: I cannot follow you on that in connection with the application for fees. The thought occurred to me, in connection with the application for expenses, because it appeared as though the California Savings & Loan League had [782] paid out expenses, but there is nothing to prevent somebody who is legitimately representing others in a class action from receiving funds from persons who might not be interested other than the immediate members of the class in their class status.

In other words, the Russell Sage Foundation might have contributed money to the expenses, although I can hardly believe anyone would be receiving interest at the rate they do on small loans that would do that, but it could be done.

My point is that that would not destroy the nature of the class action. I think it would prevent any members of the class from trying to get expenses back.

Mr. Fitting: Now one thing in that connection, if your Honor should feel that he has the right and the power to fix fees here, your Honor should bear

in mind the fact, as shown by the affidavits filed, a portion of the time here involved was spent for that committee. The exact figures appear in the affidavits just filed yesterday.

The Court: Spent in the Savings & Loan League committee?

Mr. Fitting: I don't know that the affidavits clearly state whether it was that committee or the shareholders committee, but both Mr. Fussell's affidavit and Mr. FitzPatrick's affidavit, show the portion of their time that was spent on that committee as distinguished from the time spent [783] on this litigation.

Finally, as far as Mr. Gilbert is concerned, it appears that there are these two substantial objections, first, that if there is any fund in court it was in court by the time that he got into the litigation; secondly, the class there represented in his client was being adequately represented by O'Melveny & Myers and Mr. FitzPatrick prior to the time that he came into the litigation. The litigation was far enough along so that he would know the character and nature of it, and there again if any fee is awarded it would appear that it should be all awarded to the bank or to the association, and if they felt that it should be divided among all the counsel here that would be their determination. But certainly it does not appear on those facts that he should be entitled to a separate and distinct award for his services, which are largely a duplication of services rendered by the other lawyers.

The Court: Thank you, Mr. Fitting.

ARGUMENT IN BEHALF OF THE
SAN FRANCISCO BANK

Mr. Dusenbery: May it please the court, I am appearing on behalf of the San Francisco Bank, and my co-counsel, Mr. Bishop and Mr. Angell, may wish to respond to certain points that were made here, and I would ask that they might be permitted to do so at the close of my remarks.

While we have raised in our opposition to these petitions [784] certain jurisdictional objections, and by no means are waiving them now, I wish to direct what I have to say to what I consider a more fundamental aspect of this case.

As I have listened to Mr. Works' argument and read his memorandum, I gathered the difference of position between the petitioners and the San Francisco Bank arise in these fields: We differ as to the nature of their consolidated action, with which we are concerned, and we differ also as to the application of the trustee fund doctrine laid down in the Greenough case, the Ticonic case, and others, and to the application of the doctrine of *Barnes v. Newcomb*, relating to the right to file a claim in a receivership proceedings based upon the resistance to the appointment of a receiver.

Now these actions, as I construe them, if the court please, are actions in personam. I think that they are predicated upon a different theory, but they are either actions in personam, if the court please, or they are actions only quasi in rem.

In the complaint in Case No. 5678 the point is

made that the action arises under the former Judicial Code Section 118 for the removal of liens or clouds, in other words, quieting title.

The Court: And in 5421.

Mr. Dusenbery: Yes.

The Court: I do not know that that is done in 5678, is [785] it, Mr. Works?

Mr. Works: Oh, yes, your Honor.

The Court: In both cases?

Mr. Works: That is spelled out directly.

The Court: I recall examining that with relation to 5421, but I had not recalled it as to 5678.

Mr. Dusenbery: And also the doctrine of interpleader has been made in the matter, and I would like to give some consideration to both of those.

Now the conditions of the case are important, I think, the fact that neither of these cases have been tried, they are simply pending here on answers, we have reached that stage of the proceedings and that is an important factor to be considered as to the allowance of these petitions for attorney fees at this time. In other words, the court is asked to allow fees during the pendency of the action.

Now the motions that have been presented ask the court to allow reasonable attorney fees on account of legal services rendered in the action and to order the fees to be paid out of funds or property deposited in the registry of the court or as the court shall otherwise direct.

There are various funds on deposit in the court.

The Court: Counsel has indicated that they desire to have an order directing the fees to be paid,

if allowed, out of the funds in the possession of the San Francisco Bank. [786]

Mr. Dusenbery: I assume counsel means the cash and the Government bonds which were lodged in the registry of this court pursuant to the impound order which constitute collateral security for the notes of Long Beach Association.

The Court: I do not so understand counsel. I understood counsel, and Mr. Gilbert's argument, specifically with relation to the moneys on deposit with the Los Angeles Bank merely for safekeeping, demand deposit and time deposit, were transferred to the San Francisco Bank and that not only for that reason but for the reason of the transfer of all of the assets under Mr. Works' theory and argument this court has the power and they desire that an order shall not be made directing the payment of fees out of funds other than that which are on deposit in this court.

Mr. Works: We have asked for it either way in your Honor's discretion. We say your Honor has the power to make a direct order, an order directing the San Francisco Bank to pay, or out of the registry.

The Court: I am particularly concerned with that phase of it. If fees are allowed, whether or not I can order them paid out of funds other than that on deposit in this court, because of the asserted claims of ownership and disputed claims of ownership concerning the funds on deposit in this court. I would like to avoid further complication in connection with those funds on deposit, if I can. [787]

Mr. Works: We feel that your Honor has the power to do it either way. That is our position.

The Court: Does that clarify it in your mind?

Mr. Dusenbery: I think it does from our standpoint because I think it would be equivalent to asking the court to award a personal judgment for attorney fees against the San Francisco Bank, and that being so I think we know then the fund and the situation with which we are dealing in the argument.

Now the points raised with reference to the trustee fund and interpleader doctrine—this is a quasi in rem proceeding, or some sort of a proceeding whereby the court under those doctrines, or either of them, can allow attorney fees in this case—it seems to me it constitutes a stretching of those doctrines beyond any point at which they have ever been carried before in any of the cases that I have been able to find, and I assume that since eminent counsel who made the petitions were not able to find any cases carrying it to a case like this, that they have not been able to find such a case. It seems to me it might be well before we get into the application of those two doctrines to this situation, that we bear in mind a few of the principal fundamental principles with reference to the power of the court to allow costs and attorney fees.

Now we start out with the common law doctrine that no [788] costs or attorney fees were allowed. Then statutes were passed in England by which the costs of certain character were allowed the prevailing parties. Those statutes were carried over into

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the States and under the confederacy existing in the Federal courts in the early history of it they were allowed costs to the prevailing party.

In 1853 the first fee statute was passed, a statute allowing or providing for the recovery of costs. That statute has been carried more or less through and down to the New Judicial Code where it is inserted in Chapter 22, I believe it is, and it provides for costs to the prevailing party.

The Court. In *Trimmer v. Greenough* it said it was applied to costs and not attorney fees.

Mr. Brewster. That is right. However, there is a doubt for that is allowed the prevailing party which might be called an attorney fee, but I think it might be distinguished as far as this situation is concerned.

Now the question came up early in the Federal cases as to whether or not parties could recover attorney fees and the matter was considered and came up in two cases in which the courts held definitely that attorney fees in an ordinary action between plaintiff and defendant cannot be recovered by one party against the other. A good statement of it is in *Irish v. Spain*, 22 U. S. 171, at 204, and the reasons for reaching it were set out there. They ranched out— [206]

The Court. I do not think that that is involved here, particularly in view of the line of cases which has since sprung out.

Mr. Brewster. No early as through just a step further, the development of the idea was that only attorney fees could be recovered in an ex parte

action when they were provided for by agreement of the parties, as in the case of a promissory note or contract, or when they were provided for by statute. I believe that is the condition of the law that exists at this time. I am leaving out of consideration those certain equity proceedings in rem in which in the administration of the assets of a corporation under bankruptcy, under equity receivership, in condemnation or other proceedings in rem, the court is disposing of the case that is before it and the power to authorize the payment of fees as a part of the expense of the administration in carrying out its functions in that proceeding is rem.

Now as I put myself in position here with respect to their right to recover, some emphasis has been placed upon the fact that this is a class action, that certain associations are suing on behalf of the Los Angeles Bank. I can't find, so far as the allowance of attorney fees is concerned, any distinction between class actions and actions in which the plaintiff, the real party in interest, can come in on its own behalf so far as the right to recover attorney fees from the [79] defendant is concerned.

The Court: From the common fund, though.

Mr. Einsenberg: I will come to that in a moment.

The Court: They are not saying that they want attorney fees from the defendant; they say they want attorney fees from their own money which the defendant has got and money in which they lay claim and title and this court has jurisdiction in personam over the defendant is compelled him to disgorge what belongs to them.

Is that your theory?

Mr. Works: That's it exactly, your Honor.

Mr. Dusenbery: That is the doctrine in rem, I think, but it has to be otherwise I don't believe that the court would have any power to compel a defendant to pay to the plaintiff his attorney fees.

The Court: I do not think that this court would have the power to enter a personal judgment if it were purely a case in personam directing a defendant to pay the plaintiff's counsel.

Mr. Dusenbery: I think that is pretty well settled, your Honor.

The Court: If it were not for the situation as it is here, which is both an action in rem and in personam, as to Case 5421; in Case 5678 they do not ask any judgment for damages, personal damages, against the defendant; whereas in [791] Case 5421 they do, so that it is both in rem and in personam.

Mr. Dusenbery: They ask for the recovery of the assets.

The Court: They ask for the recovery of the assets in both cases, and in 5421, in addition, they ask for a personal judgment for damages against the defendant.

Mr. Dusenbery: Now I would like to just refer briefly to that aspect of the case. On our theory it is purely an action in personam.

The Court: Which one?

Mr. Dusenbery: 5678—both of them, for that matter—involving a judicial review of certain administrative orders. That is our theory of these cases, if the court please, that they are in personam.

Let us pass that for the purposes of this argument and consider——

The Court: Even if it were a judicial review of administrative orders, could it still not be an action brought under old Section 118 of former Title 28, affecting or concerning the title or disputed title to or claim to property within the district?

Mr. Dusenbery: Our position is that it has to be strictly an action in personam and that you have to have personal jurisdiction over essential parties. Of course we have raised that point many times and your Honor has considered it. [792]

Let us look at it from their standpoint. They say they are seeking to quiet title to the assets of the former Los Angeles Bank. Now that is a proceeding not in rem but quasi in rem. You have a whole group of cases there, foreclosures of liens and mortgages, suits to quiet title, cases of that kind in which there is property within the jurisdiction of the court. The controversy regarding that is between the litigants before the court, and it is a sort of an in rem proceeding to the extent that you can bind the property by getting substituted service on parties interested in it by serving them outside the jurisdiction. But those proceedings, if the court please, that are quasi in rem, none of those proceedings has it ever been held that I can find where the defendant in those cases, because property was involved, has been required at any stage of the proceedings to pay attorney fees to the plaintiff. You sue to recover possession of property that has been tortiously taken from you and you can't go into

court in that proceeding and ask the defendant to pay you attorney fees and costs and permit you to prosecute the case to recover the property which you allege is due you, even at the end of the litigation you still can't be allowed those attorney fees.

The Court: You mean to say that somebody can come in and take your property, your house and all your property and your bank account, under some claim or color of right, and [793] that you would be compelled to finance your own lawsuit against him and could not finance it out of your own property in his possession?

Mr. Dusenbery: Your Honor, you can't determine whose the property is until the end of the lawsuit. You would have the case in order to allow attorney fees before the case is ended.

The Court: But it is the claim of right. Let us take your statement just now. If I sustained your position I have prejudged the lawsuit and decided the case in favor of the San Francisco Bank.

Mr. Dusenbery: Not at all, your Honor.

The Court: I do not see how it can be escaped. I was trying to follow that through my mind during Mr. Works' argument as to whether or not it was good faith or reasonable grounds. Your position is that they have no reasonable grounds because they have no grounds. That was the statement which you just made and which Mr. Fitting just made. So if I sustain your objection it would decide the merits of the case.

Mr. Dusenbery: I know of no theory upon which a plaintiff in an action in personam or quasi in rem,

in suing to recover for property or for conversion of property, or to quiet title for property, whether it is all the property he has or not, whether he has anything else to start the action with or not, can compel a defendant to pay attorney fees to [794] him. I can't find any such case, and if counsel have a case of that kind I would be very interested to see it. I don't think it exists, if the court please.

The Court: Does the San Francisco Bank claim that in so far as the members of the class are concerned who had money on deposit in the sums indicated by Mr. Gilbert, that it was not their money?

Mr. Dusenbery: Your Honor, whether the San Francisco Bank——

The Court: That is the illustration of the house, the seizure of the house and money. Is that the claim of the San Francisco Bank, that it was not the money belonging to the members of the class?

Mr. Dusenbery: Whether the San Francisco Bank has any property belonging to the Los Angeles Bank depends upon the validity of three executive orders.

The Court: That is not my question. My question is whether or not it is the position of the San Francisco Bank that the money on time deposit by the members of the class represented by Mr. Works and by Mr. Gilbert was not the property of those members on the date of the seizure.

Mr. Dusenbery: Your Honor is referring to the securities and the cash?

The Court: That is correct.

Mr. Dusenbery: Not at all, your Honor. That

property, [795] that money, has been theirs and they have used it.

The Court: Who has it now?

Mr. Angell: They have most of it.

Mr. Dusenbery: They have withdrawn it.

Mr. Angell: It has been changed so many times.

Mr. Dusenbery: They have put in other cash in the San Francisco Bank, they have changed that collateral, they have withdrawn it and borrowed on it.

The Court: That was not the collateral that I am talking about.

Mr. Bishop: Your Honor, there is no evidence in this record in four years that we have ever denied anybody access to their time deposits or prevented a withdrawal, and if there had been you would have heard about it.

The Court: Precisely that is the position of the defendants now. You are denying them access to it in order to pay attorney fees for them to represent themselves in their claimed rights. That is the net effect of your position.

Mr. Angell: May I answer that question?

The Court: I cannot see it any other way.

Mr. Angell: Then you don't wish me to make any statement with regard to it? I think the matter is very simple. The time deposits were time deposits belonging to the association, that is, the individual associations.

The Court: The members of the class. [796]

Mr. Angell: They were not the funds of the Los Angeles Bank except as a depositor.

The Court: I understand that. That did not comprehend my question at all.

Mr. Angell: That these individual depositors, these individual associations, at any time they chose from the time this litigation began up until the present time, because they could walk in and take out their time deposits from the San Francisco Bank, and there is no proof in here at all that any of them have ever made a request for those time deposits or that any of them who have made requests have ever been denied it. The truth of the matter is that probably all of those have been taken out and new deposits been made and borrowings made against those time deposits, and I believe there is an exhibit attached to Mr. Bogardus' affidavit that shows the gyrations of those funds.

The Court: That is the gyrations of the collateral, as I read the affidavit.

Mr. Angell: But that also has the time deposits in there in one of those columns. Now there is no showing here that any one of these plaintiffs in this class action, or any other association, has ever requested a dime from the San Francisco Bank who has not been paid.

The Court: Shall we let Mr. Dusenbery finish his argument? How much longer are you going to be? [797]

Mr. Dusenbery: Not very long. I just have a few points that I want to make, your Honor.

I want to say one thing about in rem proceedings. In my opinion this is not an in rem proceeding.

The Court: What is the date of Mr. Bogardus' affidavit, the one that was not stricken?

Mr. Bishop: The date of it is February 25.

The Court: 1950 or 1949?

Mr. Bishop: 1950.

The Court: 1950?

Mr. Bishop: Yes.

The Court: I thought that was the second affidavit which was stricken.

Mr. Bishop: No, not to my understanding.

Mr. Angell: Not to my understanding, your Honor.

The Court: I do not remember. He had two affidavits. The affidavit filed March 17, 1949, was stricken. This was filed when?

Mr. Chapman: It was served February 22d.

Mr. Bishop: It would be filed about the 27th or 28th. If your Honor will give me the file I can find it. It has a black photostat sticking out at the bottom.

The Court: Very well. All right, Mr. Dusenbery.

Mr. Dusenbery: In my opinion, this is not, as I said, either the Long Beach case or the Los Angeles case, a true [798] proceeding in rem. Both of those corporations, if the court please, are going concerns and have been throughout these proceedings. They are both solvent, both under their own management, their assets have not been taken over for liquidation by any court, and they are just ordinary corporations.

The Court: Excuse me. In answer to your sug-

gestion that it is only the stock ownership, it is not the gyrations of the fund.

Mr. Angell: I was going to say that I think this is not the exhibit that shows that.

Mr. Bishop: It is in Mr. Noon's affidavit.

Mr. Angell: Let me look at the record.

Mr. Dusenberry: I just want to make the point that in my opinion neither the Long Beach Association nor the Los Angeles Bank are under the control of any court. Their assets are not being liquidated, they are not under receivership, they are not in bankruptcy, and there is no basis on which any court could acquire or have in rem jurisdiction over the administrations of their assets. Those assets are being managed and handled by their own management, and for that reason I think the doctrine of in rem that counsel has raised here is not applicable.

Now as to the application of receiver in interpleader proceedings of the right to recover attorney fees, the only attorney fees that I can find that are allowed in interpleader [799] proceedings are attorney fees to the plaintiff in interpleader in a pure interpleader proceedings where the plaintiff is acting——

The Court: What has that to do with this matter here? The complaint was originally filed by the Los Angeles Bank on behalf of itself and its members as a class action against the San Francisco Bank, was it not?

Mr. Dusenberry: That is right.

The Court: The interpleader is involved in 5421 where the Long Beach Association interpleaded. I

do not think the San Francisco Bank interplead in 5421, did you?

Mr. Dusenbery: If counsel are not relying on interpleader, the doctrine of interpleader. I think the court's position is well taken.

Mr. Works: We made our position clear. If you will read the first paragraph of our complaint you will find what kind of a lawsuit we have got.

The Court: You did not file an interpleader in 5421?

Mr. Works: No, your Honor.

The Court: You were brought into 5421 in a cross-complaint in interpleader?

Mr. Chapman: No, they were first brought in on the first of July 1946, about a month after the action was filed, as defendants in a third-party complaint.

The Court: Then the original complaint was later amended [800] to include them?

Mr. Chapman: That is right.

Mr. Westover: Also served in 1947 on behalf of the Bank.

The Court: Very well.

Mr. Dusenbery: Very well. We are out of the interpleader field on both counts.

As I read counsel's argument here, they rely on two analogies for the power of the court to award these attorney fees. The first analogy which they draw on is the doctrine of *Barnes v. Newcomb*, that when a proceeding is brought against a corporation for the appointment of a receiver and the corporation goes ahead and employs counsel to resist the application for the appointment, it doesn't make

any difference whether the resistance comes before the appointment or whether it is a temporary appointment and they come in to set it aside. In other words, when the company is seeking to have its day in court in any form to resist the appointment of the receiver they are unsuccessful, the receiver is appointed, the court through its receiver takes in rem jurisdiction over the assets of the corporation and proceeds to litigate. The attorneys who act for the corporation in affording for them their day in court as to whether they were insolvent, whether the conditions alleged were applied and whether the receiver was appointed, may come in and present [801] a claim against that fund for reasonable compensation on the showing that the defense was made in good faith and for reasonable and probable cause.

Now I submit to the court that there is no analogy between that situation and the one that is suggested here. There the proceeding has been terminated and all the assets of the corporation for whom they worked have gone into liquidation through an equity receivership and are in the custody of the court. The only chance to recover their fees of course is to present a claim against those assets, and that is what they do in all of these cases.

In none of those cases, if the court please—I have read all of them that are cited and several others—have I been able to find one case where prior to the determination and the appointment of a receivership and its going under the jurisdiction of the

court, has the plaintiff, the defendant, ever been awarded any attorney fees between them while the litigation is going on. There is the distinction, it seems to me, between those cases.

Here in this sort of a situation, if the court please, you don't have any liquidation, the San Francisco Bank is still in existence and it is still amenable to any sort of recovery that may legally be made against it, so you don't have the necessity that confronts the courts in a situation of that kind where an honest defense has been made and unless [802] they get paid through the funds of the corporation for whom they worked they won't get paid at all. That isn't the situation here.

Now we are not contending, if the court please, that counsel who have rendered these services may not at the proper time from the proper parties be entitled to compensation for their services. If they bring themselves within the trustee fund doctrine that counsel has referred to, and the litigation which has been started is successful, the assets of the Los Angeles Bank which they allege have been wrongfully taken from that institution are restored to it, under the trust fund doctrine, the Greenough case and all the others, under the doctrine of equitable contribution they would have the right to reimbursement out of the fund protected or reserved. And that would be the basis of their right so far as attorney fees are concerned, it seems to me.

Now that is the principle which has long been established. It has been used extensively and there is nothing in any of the authorities that indicates

up to now it hasn't been adequate to protect the rights of minority stockholders or other members of the trust who feel that the trust fund is being invaded.

Counsel made another argument by analogy but he didn't refer to it in the oral argument, and that is the marital status argument. I don't know whether that is still being [803] relied upon or not. But I submit to the court that the mere fact that under the laws of domestic relations which involve the status of husband and wife, the relationship is peculiar to that particular field of law, and a court in the early stages of a divorce case brought by a wife may require a husband to pay temporary alimony and attorney fees, but that would not afford any basis for these corporations to recover from the defendant in this case in advance of the termination of the case, if the court please.

The Court: Those allowances are not made under any specific statutory authority, are they?

Mr. Dusenbery: You mean in the domestic relations case?

The Court: Yes.

Mr. Dusenbery: Yes.

The Court: That says domestic relations shall be treated differently in the allowance of attorney fees?

Mr. Dusenbery: I think they have been allowed in some states.

The Court: I know they have been allowed, but it is done on the theory of the common fund, is it not?

Mr. Dusenbery: I think not, your Honor. I think it is on the basis of status. I think it goes back to ecclesiastical law and common law, the concept of the status, the duty of the husband to support the wife, and a lot of other concepts that are peculiar only to that relationship. [804]

The Court: Of course down here we do it a little differently, you know, we make the wife pay sometimes.

Mr. Dusenbery: Yes, that is done by statute, and properly so, I assume. But I submit to the court on any basis that that argument just isn't analogous or applicable to this situation. Certainly it can't be said that the Los Angeles Bank is the wife of the San Francisco Bank so as to put them eligible for alimony or suit money or attorney fees money.

Mr. Gilbert: Mr. Works has observed that it was a "shot-gun" marriage.

Mr. Dusenbery: If you read counsel's complaints here you would assume that that was about the relationship, a shotgun pleading.

The Court: From the size of the pleadings I would like to say that if it were a wedding it was a wedding of the winds.

Mr. Dusenbery: Anyhow, your Honor, we feel thoroughly convinced that the court is not authorized to award any attorney fees or suit money or anything equivalent to it by one of these banks to the other.

We believe, if the court please, we have been able to find no legal basis upon which at this stage of the

proceedings these attorney fees may be allowed. As I said before, we are not contending that counsel are not worthy of their hire at the proper time and under the proper circumstances, [805] that they may not be entitled to compensation, but we are simply saying that at this time in this case at this stage of the proceedings they can't compel the San Francisco Bank to pay those attorney fees to them.

The Court: I see it is 12:25.

Mr. Angell: If your Honor please, the exhibit to which I referred——

The Court: If you will give the date then we can find it here and you will not get your file confused.

Mr. Angell: It is the exhibit attached to the affidavit of Mr. Noon.

The Court: Filed when?

Mr. Chapman: There are several.

Mr. Angell: And which I do not believe was stricken. It is an affidavit apparently filed on the 24th day of February, 1950. This is only a copy I have here. It sets forth the deposits and withdrawals by each of the six plaintiff associations.

Mr. Bishop: It would either be right before or right after that other affidavit of Mr. Bogardus, your Honor.

The Court: We will find it after recess. What time do you want to start again? 2:00 o'clock? It is 12:25 now. (Assent.)

Up to now, how long do you think you will want in rebuttal? [806]

Mr. Works: If I have any at all, it will be less than five minutes, your Honor.

The Court: And you will want to be heard, Mr. Westover?

Mr. Westover: I would like to have about five minutes to state the position of the Long Beach Federal.

Mr. Chapman: I could finish in about 15 minutes.

The Court: I think we had better proceed at 2:00 o'clock then. Recess until 2:00 o'clock.

(Whereupon, at 12:25 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [807]

April 8, 1950—2:00 P.M.

The Court: Mr. Bishop has drawn my attention to the answer in opposition to the Federal Home Loan Bank of San Francisco, the motion and order of First Federal Savings & Loan Association of Wilmington, and the answer was filed February 27, 1950. The affidavit of Mr. Noon is attached with a schedule No. 1.

Mr. Bishop: There are seven schedules, your Honor. Those are the actual plaintiff associations.

The Court: I do not understand them. Take Schedule 3, Los Angeles Federal Savings & Loan Association, for instance, under date of June 30, 1948, they had 1250 shares of stock, they had zero bonds on deposit, they owed \$4,700,000 principal balance in mortgages and had secured an advance of \$237,000, or a total indebtedness of \$5,000,000, against which the San Francisco Bank had only on deposit \$150,000.

Mr. Bishop: What date are you referring to on Schedule 3?

The Court: June 30, 1948.

Mr. Bishop: No, there was \$4,782,496 unpaid principal balance and mortgages on hand.

Mr. Works: Are you talking about the Los Angeles Federal?

The Court: The Los Angeles Federal. I thought that was [808] unpaid principal of balances of mortgages that were owed to the San Francisco Bank.

Mr. Bishop: No, sir. That is their collateral on deposit.

The Court: That is their collateral?

Mr. Bishop: Yes.

The Court: And the advances were what?

Mr. Bishop: \$237,000.

The Court: Who owes that to whom?

Mr. Bishop: The Los Angeles Federal Savings & Loan Association——

The Court: Owes it to the San Francisco Bank?

Mr. Bishop: That is right.

The Court: And they had on deposit \$150,000 in cash?

Mr. Bishop: That is right.

The Court: So that as against \$4,000,000 in collateral there was an indebtedness—\$4,782,000, plus \$150,000; that is practically \$5,000,000—as against an indebtedness of \$237,000 they had \$5,000,000 on deposit as collateral.

Mr. Bishop: That is correct.

Mr. Works: Did I understand you to say that they were one of the plaintiffs, because they are not. The Los Angeles American is one of the plaintiffs.

Mr. Bishop: You represent them all. There is no denial that the Coast Federal Savings & Loan Association is one of [809] the plaintiff associations that you represent?

Mr. Works: It may not make any difference, but I merely wanted to correct your statement. They are not a named plaintiff, that is all.

Mr. Angell: It is probably an error in getting them up.

The Court: This column "Bonds," that is bonds owned by the Association?

Mr. Bishop: That is correct. They leave them with our bank frequently for safekeeping only, your Honor, so if they want a quick advance they can get it, or it is merely just there for safekeeping.

The Court: The purpose of these is what, to illustrate or to show that the San Francisco Bank does not have on deposit, and has not had on deposit, any money of the members of the class?

Mr. Bishop: Your Honor, that isn't the purpose. Let me explain—and that is just what I intended to do, and give a full answer and explanation of this—there is a great deal of talk here about your powers sitting as a judge. First of all, before you can exercise, leaving out all jurisdictional problems, any equitable jurisdiction you must have something in this record that shows that a great and irreparable loss has been suffered or will be suf-

ferred that can only be prevented by equitable jurisdiction.

The Court: No, that great and irreparable loss will be [810] suffered authorizes the court to issue an immediate restraining order, and I have none here.

Mr. Bishop: Well, I will go on. Let us ask this question then: What loss has any association suffered by virtue of a merger of the old Los Angeles Bank and Portland Bank in view of the provisions of Section 26 of the Act under which they were incorporated?

The Court: I cannot come to a conclusion on that because that would be deciding the lawsuit. The only thing that I can conclude on it is whether or not there is some reasonable right to their contention, or reasonable grounds to their contention.

Now let us see. What is that code section you just cited?

Mr. Bishop: Section 26.

The Court: What is the code section?

Mr. Bishop: I haven't got it here in front of me.

Mr. FitzPatrick: 1428 or 1429, your Honor.

The Court: Of what title?

Mr. FitzPatrick: Title 12.

Mr. Bishop: The particular reason I am calling the court's attention to that section at this time is because of the discussion about *Mallonee v. Fahey* this morning.

The Court: That is section what of the Act?

Mr. Bishop: Section 26. [811]

Mr. Fitting: Section 26 is 1446.

The Court: Let us just read that into the record here now:

“Whenever the Board finds that the efficient and economical accomplishment of the purposes of this Chapter will be aided by such action, and in accordance with such rules, regulations and orders as the Board may prescribe, any Federal home loan bank may be liquidated or reorganized and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization any other Federal Home Loan Bank may, with the approval of the Board, acquire the assets of any such liquidated or reorganized bank and assume liabilities therefor in whole or in part.”

Now the question arises as to whether or not there is reasonable ground under that section for the contentions of the plaintiffs, and if they are proceeding in good faith. From the face of the orders it does not appear that they were made pursuant to any general rules or regulations of the Board.

I do not know how those orders provide for its stock to be paid off—I suppose in reading them through there must [812] be some provision in them—but it cannot be said on the face of it that there was payment of its liabilities or making provision for the payment of its liabilities. They transferred all of the assets to the Federal Home Loan Bank of Portland.

The next sentence says, "Such a home loan bank may acquire and assume liabilities with the approval of the Board," and yet the allegations in the complaint are to the effect that that was not done, and it appears from the minutes here that any approval that was given by the Portland Bank occurred not before April 8, whatever year it was, whereas the instantaneous liquidation, consolidation and creation occurred on March 29, and there is no showing in the record that at any time has the Home Loan Bank of Portland assumed the liabilities of the Los Angeles Bank.

Mr. Bishop: I contend to the contrary. The absolute opposite appears in this record. There is not one person that can deny or assert that fact. Every one of them has received any amount of money they had on deposit when they wanted it. They have been able to make their loans. They didn't lose anything.

The Court: Perhaps I did not make myself clear.

In the record before me now in this case and from the allegations in the complaint, there is reasonable grounds to believe that the plaintiffs have a good cause of action in [813] that it does not appear from the evidence in this case to date that there was any assumption of liability by the Home Loan Bank of Portland, or any acceptance of the assets with the approval of the Board. In other words, the Board did it and the Federal Home Loan Bank of Portland after that approved it. It is just the reverse.

Moreover, the allegations of the complaint allege

that it was done unlawfully. So it is not a question, I again must emphasize that the court is not called upon at this time to determine the merits of the case, and anything that I have said or am saying is not to be indicative of the merits, but solely goes to the question as to whether or not there was good faith and reasonable grounds for bringing this lawsuit.

Mr. Bishop: Your Honor, that is a very splendid argument from the point that you are directing it to possibly, but that is not the argument I am making.

The Court: I am not making any argument, Mr. Bishop.

Mr. Bishop: I would like to go on with the point I am trying to make, and that is if I contract to deposit money in the Pacific Southwest Bank and I buy stock in that bank and I get up tomorrow morning and find that that bank's head office was moved to an office that used to be the Security Bank at the corner of Fifth and Spring, with new officers and new directors that I didn't elect, and I had no choice in the officers, and the furniture is moved—— [814]

The Court: And the employees all fired.

Mr. Bishop: No, not all the employees.

The Court: Not all of them?

Mr. Bishop: No. Some of them were. But I don't think that makes any difference.

When I contract against the majority stockholding in this instance, the United States of America, and accept the right to the credit of the United

States, accept the right to Federal insurance, accept the right to do business under a name that legitimately ties to a business in this state that has grown into disrepute that I was willing to do——

The Court: Suppose that you put that money in that bank that you just mentioned and the next morning you woke up and found that the Security-First National Bank had walked into the bank and said, “You are dissolved, you are liquidated, your assets are transferred to me and this bank is closed”?

Mr. Bishop: Yes, sir. And if my by-laws and charter and the act under which it was created said so, I would be regarded as stupid if I tried to complain. We are getting now to the whole meat of this case.

Congress made a mistake in the early days of the history of this country and they weren't going to make it again. There has been continuous complaint about the currency and issuance of money in this country. This time they kept control [815] of the banking system so that that claim could not be uttered again. That is what *Mallonnee v. Fahey* means.

The Court: The complainants are not complaining about control by Congress, they just said that the defendant bank did not pay any attention to the law. That is the long and short of their complaint.

Mr. Bishop: Your Honor, I want to go back to the schedules and the question showing that there

was no loss suffered by any of these parties here.

The Court: It is not a question of loss.

Mr. Bishop: Or possible loss or anything that they can complain about. They can get their money. It has been demonstrated that they can get it.

The Court: I passed on that in denying the motion to dismiss.

Mr. Bishop: Well, Mr. Noon's affidavit is not stricken. He was here. That was the ground upon which those affidavits were stricken, and I think I have the right and opportunity to point out, like in the instance of the Coast Federal, they had \$10,000,000 in bonds and \$3,700,000 in advances on the date of the merger. On June 30 they had no bonds, they had no loans, they had no collateral, they had nothing with us. What did they lose? Nothing. What right have they to assert? None. What other right have they? They have a right to borrow from our bank. All right. [816]

On June 30, 1948, they come back and they deposit \$3,000,000 collateral and they borrow \$2,000,000. And that fact is shown through Schedules 1, 2, 3, 4, 5, 6 and 7, leaving out the one association, for all of the plaintiff associations before this court.

We haven't been arguing about estoppel, we have been arguing about estoppel by contract, by charter, and that is one of the points that will ultimately decide this case. And in that connection, I am very happy to see opposing counsel finally have to hang their hat on divorce cases or a case like the Eggert case, a case that has no more resemblance to this case than if it had never been decided.

The issues there were at a point of final decision. There was an appeal pending. There wasn't a question of the serious outcome from the standpoint of substance or from the standpoint of jurisdiction or from the standpoint of venue. Nor was there a question of the presumption of the regularity of official acts. No matter what this court wants to decide this morning, it indicates it is going on the major premise that just because it was instantaneous that Mr. Fahey committed an unlawful and unwarranted act.

The Court: No, I am not.

Mr. Bishop: That is what their complaint is based on, your Honor.

The Court: My questions were directed to counsel this [817] morning with relation to whether or not there was an analogy between an instantaneous dissolution or liquidation and one which might occur over a period of time, such as those which are involved in the cases here. What difference does it make?

Mr. Bishop: Your Honor, I claim that when I make an agreement by my charter—and that has been the decision of the United States Supreme Court for too many years to mention, it is so elementary—that that is the contract that is accepted, and remember they are contracting and they ask for the——

The Court: It is not so many years that one cannot remember. It seems to me as though I remember until recent years the Supreme Court always said that every portion of the Constitution

was as much a part of every law of the United States as if it had been written in there. Now this doctrine seems to say that a person, when he makes a contract or gets a charter under a law—and I say it frankly and candidly and I would say it to the Justices myself—they assume that they thereby waive their constitutional rights which they previously held they had a right to assume was written into the law.

Mr. Bishop: Your Honor, this isn't a private corporation, this is a corporation of one to go into business with the Federal Government. Due process of law wasn't designed [818] to protect the Federal Government, it was designed to protect the private citizen.

The Court: From the Government.

Mr. Bishop: Yes, but these people, the Bank, not the associations, went into business with Uncle Sam and Uncle Sam had a majority control and put up the real money, the real financing. This situation, I am confident that no Supreme Court will hold that due process of law was designed to protect the Government from itself. That is what you will have to hold.

The Court: No.

Mr. Bishop: Yes, you will.

The Court: Due process of law was designed to protect the individual from the Government.

Mr. Bishop: Yes, but these people went in business with the Government and the Government had over a majority of the stock.

The Court: I know what *Mallonee v. Fahey* says, and I know the doctrine, and I cannot see how they could have reached the conclusion unless they came to the conclusion that by accepting a charter anybody waived their objections to the constitutional rights that they may have otherwise had written into the law.

Mr. Bishop: Reverting again to the position of this case as distinguished from cases like the *Eggert* case, you had a [819] common fund in court, you didn't have to make a finding nor did you have to hold——

The Court: No, there was no common fund in court in the *Eggert* case. It was not in court, it was in the hands of the state official.

Mr. Bishop: Yes, sir.

The Court: The liquidator.

Mr. Bishop: Yes, sir, as liquidator.

The Court: Or whatever you call him.

Mr. Bishop: And in that same case, there are cases where the Pacific States were denied attorney fees that weren't cited or called to the attention of the court. There were several cases of attorney fees in that case. I can get the citations.

Your Honor, I always have to point out that we have to go back to the essential pleadings here. The essential pleadings here are based on a charge of fraud. It is the one time in a civil action when the court must indulge in a presumption of innocence and not in wrongdoing. I am pointing out that with every ultimate, every remotely connected ultimate, issue remaining undecided in this

case, that no matter how well counsel deserves to be rewarded for their services, that time is not here. They have not established one principle yet upon which they can recover an interim allowance in any court of chancery that would award them, with all these [820] questions in front of it, a fee at this time. And we don't stop any one of these associations from going and getting millions of dollars out of our hands to fight us. They got along for four years, they can wait another four years, and there is no more showing of hardship than that.

I see no reason why a decision has to be rendered now with an appeal pending that may decide all the issues.

The Court: Of course, Mr. Bishop, there hangs always over this case by a very slender thread in any consideration of such an argument as you are making the fact that one of the grounds of seizure of the Long Beach Federal was an appropriation for the payment of attorney fees to oppose the Board.

Mr. Bishop: You are, of course, assuming that that is a fact.

The Court: I said the grounds that they assign.

Mr. Bishop: Sure, and the grounds for their whole action is fraud.

The Court: No, the grounds that the Board assigned when finally called upon to set forth the specification, or whatever they called it, one of them was that they had appropriated \$50,000 for attorney fees. So to follow your theory that they have no

hardship, that they can get their money from the San Francisco Bank and use it to pay attorney fees, of course the example is there.

Mr. Bishop: That is another point. I am glad you [821] brought that up.

The Court: What prudent businessman would go to work and do the same thing that was done in the Long Beach case when it has resulted in this kind of litigation?

Mr. Angell: We do not concede that.

The Court: You do not concede what?

Mr. Angell: That any prudent businessman operating a corporation which was a public agency would pass a resolution to extract \$100,000 out of the corporation's coffers and put them in the hands of an individual beyond the control of the corporation's directors and to extract \$50,000 in one check and put it into the hands of a third party to control so that if a conservator or anyone came in it would be beyond their control. That would not be the act of a prudent businessman, let alone when you apply it to a Government agency and which is enjoying tax freedom and everything from the Government to handle funds of that matter. It just can't be done, either by a prudent or an imprudent businessman.

The Court: The fact remains that on the face of the resolution it was for the purpose of attorney fees and the fact remains that that was one of the grounds assigned for seizure of Long Beach.

Mr. Angell: And a mighty good one.

The Court: All the more reason, if that were a good one, that the prudent businessman in charge of these associations [822] would be hesitant about withdrawing any funds to pay attorney fees.

Mr. Bishop: I believe, your Honor, a prudent businessman, if he was acting in good faith, would have done it in a far different way.

The Court: Of course. Everybody does everything differently. That keeps us from all being like the people in the cemetery.

Where is that black book, the corporate minutes?

Mr. Bishop: I would like to point out to your Honor, while waiting for this book, that there is another misconception in this case. The court apparently is going on the basis that the Supreme Court of the United States refused the stay on the \$50,000 fee awarded to Mr. Westover in connection with his services for the Long Beach Association and that that apparently affords some basis for decision now. That cannot be and is not the fact. There the funds were in this court. In addition, if they lost the case the loss would be theirs and it would not have been the defendants' loss. Here there isn't one similarity between that case and this.

The Supreme Court also pointed out that it didn't believe that a \$50,000 fee would jeopardize that institution, realizing the point we are making that if it hadn't been its funds it would have taken a different position and no interim allowance would have been made. That is not true here. [823]

The Court: But, counsel, at the time that case

was decided those funds were in the possession of Mr. Ammann as conservator, were they not?

Mr. Bishop: My understanding was that the funds were in the registry of this court.

The Court: The funds from which the allowance was made were in the registry of this court, but the assets of the association were in the hands of Mr. Ammann as conservator and he was claiming all of these.

Mr. Bishop: That is correct.

The Court: And the shareholders had no right to any one of them.

Mr. Bishop: Your Honor, his claim of those funds was on behalf of the association, not of himself individually. That was what the Supreme Court decided. There is no doubt about that. No one can quarrel with me or argue about that.

Mr. Angell: The Supreme Court merely decided that you can't use a special writ in place of an appeal in a case of that kind, and with that none of us can quarrel. That is all it did hold.

The Court: Very well. Let us let Mr. Bishop finish his argument. Excuse me for interrupting you, but I have another question that I want to ask you in just a moment as soon as I find the minutes here. I do not know that it is in LA-300. What I am looking for are the minutes of April 8, 1946, I [824] think.

Mr. Bishop: I think I know the minutes your Honor is referring to.

Mr. Westover: It is right there on your desk. It is page 37, I believe.

(The volume referred to was passed to the court.)

Mr. Chapman: Was that a stockholders' meeting or a directors' meeting?

The Court: No, this is not what I am looking for.

(The volume referred to was passed to the court.)

The Court: Yes, this is it.

Mr. Angell: What was the date of the minute?

The Court: April 8, 1946, special meeting of the board of directors of the Federal Home Loan Bank of San Francisco, which immediately follows on page 88, minutes of the meeting of the board of directors of what is entitled the Federal Home Loan Bank of Portland, March 11, 1946, beginning on page 81 and ending at the top of page 88.

Now here is my question, Mr. Bishop: Were there any rules or regulations on March 29, 1946, that had been promulgated by the Board concerning the liquidation or dissolution of Federal home loan banks that were in effect on that date?

Mr. Bishop: Your Honor, we didn't need any, first of all.

The Court: I did not ask you that question. [825]

Mr. Bishop: May I finish the answer, your Honor?

The Court: You have not started to answer.

Mr. Bishop: Yes, I have.

The Court: No, you have not. I asked you

whether or not there were any in force and effect. If you do not know, that is one thing.

Mr. Bishop: Your Honor, at that time there weren't but they weren't necessary. The rest of the sentence that I was going to say, I want to call your attention to Section 3 of the Act, that the districts thus created may be readjusted and new districts made from time to time and created by the Board not to exceed twelve in all.

The Court: I understand.

Mr. Bishop: This was merely a readjustment and a merging of two banks.

The Court: Of the district.

Mr. Bishop: Yes, and of the change in name.

The Court: Were the acts done under Section 3 or under Section 26?

Mr. Bishop: I am not going to assume to state what the Home Loan Bank Board's position is in that matter.

The Court: Very well.

Mr. Bishop: I know what can justify their position. I know what the Mallonee decision justifies. You are there admitting then that this court had no jurisdiction because [826] they haven't attempted to exhaust their remedies before that.

The Court: Mr. Bishop, I am not admitting anything.

Mr. Bishop: Your Honor, I was reminded of a story told last night by counsel of a court that was arguing the other fellow's case and I had to finally object because that court had argued my

case once before and I lost it. I kind of feel in that position myself today.

The Court: Well, I should say, Mr. Bishop, that if you feel that under the statutes I possess any ground of disqualification the remedies are open to any counsel here, and if there is the slightest suggestion of that I shall at this moment adjourn and you may take your remedy.

Mr. Bishop: I do not believe that my facetious remarks would be construed in that manner, but I do wish to say——

The Court: I am asking you now if it was intended at all to suggest any ground of disqualification on my part.

The Court: No, sir.

The Court: Very well.

Mr. Bishop: Now your Honor has raised the question about assumption of liability. I do particularly call your attention to Order No. 5082 of March 29, 1946, the first paragraph, where it is stated:

“That effective March 29, 1946, the Federal Home Loan Bank of Los Angeles shall be liquidated and reorganized and all assets and property of [827] any kind or nature of such bank, including any unexpended amounts in approved and outstanding budgets and personal, but excluding officers and directors, are hereby transferred to the Federal Home Loan Bank of Portland and all the liabilities and obligations of such Federal Home Loan Bank of Los Angeles are to be assumed by the Federal Home Loan Bank of Portland.”

And I challenge anybody to point to the record where we have failed or denied any such obligations. The contrary appears of record.

The Court: The minute books have been here, counsel have all had an opportunity to examine them, no resolution of authority of assumption of such liabilities has been called to the court's attention and, moreover, this is an order promulgated by the Board. This is the order which transfers it. The statute says that in case of any such liquidation or reorganization any other Federal Home Loan Bank may—I take it “may” allows some discretion on the part of an existing bank—with the approval of the Board, acquire assets of such liquidated * * * and assume liabilities therefor.

Now it may be that that means “shall,” but until the Supreme Court tells me that this particular “may” means “shall” when directed by the Board, I am going to read the [828] statute in the way that I ordinarily understand the English language.

Mr. Bishop: Well, my answer, your Honor, to that proposition is simply this: Over a period of four years the monthly statement of the Bank is approved by our board of directors and those statements have been introduced, some of them, into evidence by our opponents, and there are the admitted and assumed liabilities and obligations of our bank, which it has never denied and which our directors have never challenged.

Mr. Fitting: If the court please, I think I have an easy answer to this assumption question. The

question is, as it bears on good faith, as I understand it.

The Court: And reasonable grounds.

Mr. Fitting: And reasonable grounds, that is right.

The Court: Not reasonable doubt.

Mr. Fitting: Reasonable grounds.

The Court: Reasonable grounds.

Mr. Fitting: Reasonable grounds at the time the suit was brought. Now these books have been, as counsel have stated, just been produced——

The Court: They have been in the hands of the Board for a long time. If there was anything in them that would show assumption of liability, I should think they would have been produced. But go ahead. [829]

Mr. Fitting: The question is, was it brought in good faith when it was brought. On this question of assumption, what did the parties think when they brought the action? Their verified complaint, on page 13, line 23, subparagraph (g)—this is the verified complaint to enforce legal and equitable claims, to obtain possession of and to remove liens from and clouds upon title to property and for other general relief of the bank and the class; these are a list of allegations of what Mr. Fahey did—subparagraph (g):

“On information and belief, to coerce and he did coerce the said Portland Bank, its directors and officers, wholly without the opportunity of exercising free choice in the matter, into purportedly

acquiring the assets and assuming the liabilities of the Los Angeles Bank."

The Court: Purportedly assuming.

Mr. Works: Under coercion.

The Court: That is what they allege.

Mr. Fitting: The question is, did they assume them. Here they say they were coerced into assuming them.

The Court: The question is not, did they assume, the question is, is there reasonable ground for the plaintiff to be here in court with this lawsuit.

Mr. Fitting: And the question, as I take it, one of the points relied on to show reasonable grounds was that there was [830] no compliance in that Portland never assumed them.

The Court: There is no showing that they have. In fact, there is just the contrary shown by the evidence here.

Mr. Fitting: I say that in their complaint it indicates that at the time they filed their complaint they were under the impression that Portland had assumed them.

The Court: Purportedly assumed them, it says.

Mr. Fitting: Purportedly assumed them, yes, but by "purportedly" they meant that it was an involuntary assumption.

The Court: What is the first part of that again?

Mr. Fitting: On information and belief, to coerce and he did coerce said Portland Bank.

I just wanted to call that to your Honor's attention.

The Court: Very well.

Mr. Angell: I just wish to call to your Honor's attention, as a matter of law that one whose obligation was not assumed and who had not been paid might raise these points, but how they can be raised by the Los Angeles Bank, or anyone else who has not shown one iota of injury from such non-assumption, if it humanly could be possible that such was the fact, but this being a public instrumentality it lay within the power of the commissioner to say it is a new creature, as to its business out here on the Coast, you are going to take over those obligations. That is nothing more than an [831] argument of the Board at Washington to carry on its administrative functions.

Now it may be that Los Angeles has a vested right to the maintenance of a bank here. If it has, it is the only locality in the United States where such is the fact. They moved other banks within the United States and there were no such suits as this which followed. They moved the head places of those banks. California did not, under the act or any law, have a "lead-pipe cinch" on the control of the board of directors of the Los Angeles Bank, or any other bank. As a matter of fact, it was the only bank in the United States that happened, by reason of the location where one state could elect all of the control of that bank.

All of those are wholly specious arguments. The law says how much each state is entitled to as to representation on each bank. It says there shall be one, and California has had its one.

Now the point is that for four years the San Francisco Bank has functioned, it has assumed those obligations, there is no showing here that they have not paid those obligations, there is not a single creditor here complaining about obligations, and how that could possibly be involved in this litigation is beyond comprehension.

The Court: Mr. Bishop, another question of you: Are there any rules and regulations now in force concerning and [832] regulating the matter of liquidation or dissolution of Federal Home Loan Banks?

Mr. Bishop: Not that I know of.

Your Honor, in conclusion, I think the best illustration of the weakness of our opponents' position here, and the seriousness of the question before the court, is this: There isn't one case before the court that would authorize, in a case of this kind, this court to make this award, and they cannot point to such a case because they haven't got a case where it involves a Government instrumentality owning more than 51 per cent of the stock, as was true in this case at the inception of this lawsuit. And I concur in Mr. Angell's remarks that certainly Uncle Sam can change the name, the place, etc., of this bank any time he wants to without rule or regulation when the act says he can.

Thank you.

The Court: Is that all? You have nothing further, Mr. Angell?

Mr. Angell: Nothing further.

Mr. Dusenbery: Nothing further from the San Francisco Bank.

The Court: Very well.

Mr. Angell: Pardon me. Your Honor, I was looking for a rule. You asked whether there were any rules in effect at that time. I believe there was a rule in effect at that time. [833] I believe it says something to the effect that 20 associations objecting to any order of the Board could present a petition or request to the Board for a hearing on any such order.

The Court: Of dissolution or liquidation?

Mr. Angell: I believe any order. I believe it is a general provision. And there is no evidence here before the court that any such request for a hearing was ever had or filed. If I locate it, I will give your Honor the rule.

The Court: What is the section of the statute that provides that the Federal Deposit & Insurance Corporation will be appointed receiver for liquidation? Do you recall, Mr. FitzPatrick?

Mr. FitzPatrick: That is in the Home Owners Loan Act, not in this Federal Home Loan Bank Act.

The Court: Well, it is in Title 12, Banks and Banking, is it not?

Mr. FitzPatrick: It is the Home Owners Loan Act and I believe that is 1461 of Title 12.

The Court: Yes.

Mr. Chapman: I have the text of it. I don't know whether you have the reference to the code or not. It is in the creation of the Federal Savings

& Loan Insurance Corporation, which is part of the Insurance and Savings Accounts under the Act providing for insurance of saving accounts as [834] amended. The section is liquidation of insured institutions, subdivision (b), which says that in the event that a Federal savings and loan association is in default the corporation shall be appointed as conservator or receiver and as such is authorized to take over the assets, etc.

And then in Section (c), that in the event any insured institution other than a Federal savings and loan association is in default the corporation shall have the authority to act as conservator, receiver or other legal custodian of such insured institution and the services of the corporation are hereby tendered to the court or other public authority having the power of appointment, and then it goes on.

The Court: You mean the statute recognizes that a court might appoint a receiver?

Mr. Chapman: Congress doesn't seem to go quite as far as the Board.

The Court: Did you find the rules and regulations effective with particular relation to liquidation of Federal home loan banks?

Mr. Bishop: Those sections in the Federal Insurance Act are only in relation to institutions about the appointment of conservator-receiver. That is not in relation to an association.

The Court: I do not know what a bank is if it is not an institution. [835]

Mr. Bishop: Well, it isn't an association that is

insured under the Act. We are not an insured institution. Our depositors are not insured to the extent of \$5000.

Mr. Fitting: If the court please, 1446 of Title 12 says that the bank can be liquidated.

The Court: That is the one I just read the whole text of.

Mr. Fitting: Yes, in accordance with such rules, regulations and orders. Now the orders were issued, and I think it is a fair reading of the statute that it can be done by rules, regulations or orders. To liquidate a bank you don't have to have a rule and a regulation and an order.

Mr. Bishop: Those orders have been held to be regulations.

Mr. Chapman: May I have the number of the other section that was mentioned?

Mr. Angell: I am still looking for it.

Mr. Works: I think we understand what your Honor is talking about even if the other side doesn't, which is simply the mode as the measure of the power, and that is a question which anybody can raise with reference to what a public officer does or does not do.

May I just say one word, your Honor—and then I am through—in order to correct what I believe is a misapprehension of Mr. Fitting about the Eggert case. [836]

The Eggert case was an interim application. The application was made in the lower court while an appeal on the merits was pending in the upper court. The judgment had not become final against

Pacific States. The fee decision was reported in 53 C. A. (2d) at page 554, and the decision was rendered July 24, 1942.

The decision on the merits, if your Honor please, affirming the judgment below against Pacific States on the merits was reported in 57 C. A. (2d) at page 239, and the date of the opinion is February 23, 1943.

Both in the fee appeal and in the appeal on the merits a hearing was denied by the Supreme Court of California.

I have nothing to add unless your Honor has some questions.

The Court: No.

On the matter of rules and regulations, I am not concerned now with so much an interpretation of the statute, I am merely inquiring whether or not there were any.

Mr. Works: I have never heard that there were any. If these gentlemen would show them to us, we would be happy to see them.

The Court: Were there any at that time and none since, is that correct?

Mr. Works: That is my understanding, your Honor. Mr. FitzPatrick knows more about the decisions than I do. [837]

Mr. FitzPatrick: That is my understanding, your Honor. At the time of this seizure, in March, 1946, there were no rules and regulations of the Home Loan Bank Board providing for the merger or liquidation or reorganization of Federal home loan banks. And there are none since.

The Court: Mr. Westover, you wanted to make your statement?

ARGUMENT IN BEHALF OF SHAREHOLDERS' COMMITTEE

Mr. Westover: Your Honor please, on behalf of the Shareholders' Committee of the Long Beach Federal Savings & Loan Association, plaintiffs, who instituted Action 5421-PH, the first action, on May 27, 1946, I might state that our position, first, is that certainly counsel—and apparently all agree—are, like the laborer, worthy of his hire. The question seems to be a question of who pays.

There certainly is a compelling necessity at this time that some allowance be made for payment of counsel for the Los Angeles Bank and for the First Federal Savings & Loan of Wilmington, the plaintiffs in Action 5678, which was instituted a few months later, in August of 1946, and which repeatedly has been represented to this court by letters, I believe from the Board, the Home Loan Bank Board at Washington, as inextricably interwoven with the first action, 5421-PH. I think that is also borne out by the recent——

The Court: I decided that before the Board did. I consolidated [838] them.

Mr. Westover: That is right, your Honor. That was consolidated, and apparently they are all in agreement on it, even counsel, Mr. Verne Dusenbery, agreed in the points on appeal with the Government's position that the claims in the second

action, referring as they set it up to 5421-PH, are inseparable from those alleged in the other consolidated actions. Hence it would appear that the two actions are completely interwoven and consolidated, and there seems no argument on that, as well as the fact, or in addition to the fact, that your Honor did consolidate them several years ago.

That being so, it seems to me that the original jurisdiction taken, assumed and exercised and carried out by your Honor, based upon old Section 118, I believe it was, of Title 28, based upon the interpleader provisions of Section 2641 of Title 28, I believe it was, and on the other grounds of interpleader, applies to both cases and I think it is well established that the jurisdiction would be assumed by a court of equity and that that court is not deprived from that jurisdiction once it acquired it and had it and exercised it. It is not deprived by some subsequent act or change in circumstances of the litigation. So if you ever did have jurisdiction, I feel that you certainly still have jurisdiction.

Now there definitely have been numerous orders and findings in various matters that have specifically found that you [839] did have jurisdiction. Such orders have been either appealed or the time for appeal expired. They have been affirmed by failure to appeal or they have been affirmed by dismissal of appeal, not once but several times. Hence the question of jurisdiction seems to me is pretty well determined already.

The question of reasonableness of the institution of the original actions and the reasonableness of the

grounds for bringing the actions has, I feel, been laid at rest by the Supreme Court of the United States itself in *Mallonee v. Fahey*.

The Court: So I would guess.

Mr. Westover: It seems to me we have been doing a lot of arguing about that. The court there said, at page 11 of this little memorandum opinion, on June 23, 1947, speaking through Mr. Justice Jackson:

“Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.”

Then skipping some of the other matters and going to the bottom of that page and resuming the quotation:

“It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs’ charges that ill will and malice [840] actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, and we make no determination or intimation concerning the merits of these issues or as to other remedies or relief than that in the judgment before us.

“Our decision is that it was error in the court below to hold the section unconstitutional, to oust the conservator or to enjoin any of his proceedings or to enjoin the administrative hearing, and this without prejudice to any other administrative or

judicial proceedings which may be warranted by law.”

We are now proceeding under such judicial proceedings.

Likewise there has been indication that attorney fees, according to the so-called “ultimatum” letter from Mr. Ford, the assistant to the United States Attorney General, to the effect that attorney fees should be determined in adversary proceedings, and hence that is being done here.

Now as to the question of who should pay these attorney fees, obviously the amount is one that is clearly, I think, apparently concededly within your Honor’s determination and in the exercise of your discretion. [841]

As to the funds from which such attorney fees should be paid in making an interim allowance, I think that in addition to Section 26 of the Home Loan Bank Act, the one which has been here under discussion about their having been no assumption of the liabilities by the Portland Bank—I might digress a moment to say that last night during the period of time we were allowed to examine the minute books, I particularly looked for any resolution of the Portland Bank or of the San Francisco Bank specifically assuming any such liabilities or agreeing in any way, or any language to make such an assumption of liability to comply with the provisions of Section 26 of the Act.

The Court: What was the date of those minutes where they show that the Portland board did

not authorize it? I read them last night. It is not in those of April 8th.

Mr. Westover: No. As a matter of fact, not only did the board make no resolution of assumption of liabilities, which I take it is an affirmative act, not just one of negation, but likewise the stockholders on July 28, 1947, at San Francisco, at a stockholders meeting which is in the so-called black book, your Honor, the other book, specifically by a majority vote of the stockholders in their stockholders meeting specifically passed a resolution to the effect that the San Francisco Bank did not exist, that there wasn't even a meeting of the San Francisco Bank stockholders at all, that [842] it was a meeting of the stockholders of the Portland Bank and of the Los Angeles Bank and that the orders, according to the stockholders, of the commissioner were apparently invalid.

Likewise the stockholders in 1948, prior to the filing of the order to show cause here in July of 1948, had adopted and voted to the effect that the funds of the San Francisco-Los Angeles-Portland Bank, or whichever one existed, should not be continued to be used to prevent the restoration of the Los Angeles Bank and the Portland Bank.

In spite of that, the directors and the officers of the so-called San Francisco Bank have continued to use those funds in opposing the recovery by the Los Angeles Bank of its funds and assets, and now they are here today continuing to oppose the right of the stockholders, contrary to the wishes of the stockholders, to allow those same stockholders any

portion of their funds to finance the litigation to recover their assets.

Now Mr. Dusenbery suggested this morning that there was no concept under which the attorney fees could be paid for the recovery of assets wrongfully taken. I haven't time to bring decisions to your Honor, but I think it is a well-known principle of law that in a conversion proceedings the costs of expenses of recovering the assets wrongfully taken or converted can be assessed as damages, and that one of the elements of such damages is attorney fees in the recovery of the [843] wrongful taking of assets.

Hence it seems that certainly under our complaint as amended and otherwise this started out to have in one count a conversion, seeking recovery of assets wrongfully taken. Hence it would appear that under that theory also the attorney fees can be allowed, at least an interim allowance.

Now at this time somebody has got to—it is a matter of compelling necessity—advance the necessary funds to permit the litigation to continue on behalf of the Los Angeles Bank and its shareholders committee, and while I do not feel that the Long Beach Association as such should be required to bear the burden of the entire cost of the efforts to recover the assets of the Los Angeles Bank, it does appear that the funds in court can properly be used as a means of supplying an interim allowance for advancement on account of attorneys' fees to counsel representing the Bank and the other association with Mr. Gilbert, and that your Honor

can either at this time determine and assess, if you feel so inclined to, and should advance those funds.

I feel that in the long run and in the final analysis the entire cost of attorneys' fees for recovery of assets should be borne by whoever is ultimately determined to be the wrongdoer, and that certainly should not be the Long Beach Association, who was the victim.

For that reason I feel that the 16,000 shareholders of [844] the Long Beach Association should not be required to be burdened with those costs excepting as they might be required as their pro rata share as a stockholder of whatever bank may ultimately be found to exist, if such ultimately determined existing bank is assessed some costs.

The fees at this time might well be taken out of the funds in court. I feel they should be assessed against the San Francisco Bank, or rather the Portland Bank, as it is sometimes or formerly known, and their assets in court, if they have any under the final and ultimate determination. Otherwise your Honor should reserve, in my opinion, the question of who is to be assessed such attorneys' fees for final determination of the litigation.

Thank you.

The Court: Mr. Chapman, how long do you expect to be?

Mr. Chapman: I think 15 minutes or less, your Honor.

The Court: Maybe we can have a short recess.

(Short recess.)

The Court: Mr. Chapman.

ARGUMENT IN BEHALF OF LONG BEACH
FEDERAL SAVINGS AND LOAN ASSO-
CIATION

Mr. Chapman: Your Honor, it is interesting to listen to the very plausible statements that nobody was harmed and nothing was done and they just sort of changed the name and moved the district, something like that. To really appreciate what went on and the matters that brought on this litigation, [845] you have to personally experience it, as we did in Long Beach—the lines of people clamoring for their money, the run.

Now in the Los Angeles Bank it was a little different situation. Those were the associations that were one step removed, but the bank to which they looked for their emergency funds in time of trouble suddenly was changed. For their purposes it had disappeared. The board of directors who had the power to grant them loans or deny them loans when they were in trouble were not the board of directors they had elected. It was one chosen by the defendant Fahey.

That, however, is a minor point, as important as that is. On the night of the 28th of March, 1946, the Los Angeles Bank existed and it had \$46,000,000 to defend itself with, and if anybody had undertaken due process or legal procedure it would have defended itself.

Now the question before you now on these attorney fee applications is simple. Can the seizing

defendants deny due process of law? Can they by summary seizure, without notice, hearing or trial, denude this bank of every asset and leave it helpless to make any defense? That is the simple question before you.

If they can, the due process clause of our Constitution means nothing. And as far as the United States Supreme Court went in upholding estoppel in *Fahey vs. Mallonee*, they left due process open. They upheld your Honor's award of \$50,000 [846] to counsel to try this litigation, and they did it at the very hearing and in the following opinion to the one in which they said that the act was constitutional. By so doing they made the law of this case that due process was to be granted, and the defendants who had their property seized from them and had to become plaintiffs, had a right to enough of their own assets to be heard, to bring their grievances to a fair and impartial court and have a trial. And if these things that were done were all proper, then they can be upheld.

But if they were wrong, the seizure and the starvation of attorneys and parties for four years should not decide the litigation. It should be decided on the merits, and you can't do that without full judicial proceedings, and in litigation of this magnitude you can't have full judicial proceedings with no attorneys, no resources and no funds. I know whereof I speak because we had to try without any assets to get our bank back, and we did it, but we only did it with all the efforts we put forth, because your Honor made us an allowance to one

counsel of the Shareholders Committee out of our assets regardless of the fact that somebody had tried to confiscate them. And that is what you are being asked to do for the Los Angeles Bank.

I have never forgotten Judge Mathews in the Circuit Court. We were fighting the stay. The Supreme Court had [847] denied the writ, where they made you a defendant, and said that it won't hurt to pay Mr. Westover enough money to have the case tried. And these same gentlemen, or their predecessors—we seem to have shifting teams here each time as time goes on—urged you to stay the order that you made after the Supreme Court hearing, and you denied that stay.

They immediately dashed to the Circuit, and that was the last court they could get to. They ran out of courts. You said we could have enough funds to try our case on the merits, the United States Supreme Court said we could have enough funds to try our case on the merits, but the Circuit hadn't said so yet. So they dashed up there with a stay of execution application.

Mr. Westover didn't think it proper to argue his own fee application. I argued it for him. And Justice Mathews asked the question, he said: "What, Mr. Chapman, if it turns out after we give you this money and let you try this litigation, that you are wrong, that the conservator was properly appointed and everything was correct in the seizure?"

And I gave him the question back: "Put it another way, suppose we are right but for lack of

funds to prove it we lost not on the merits but from exhaustion. Is that American justice?"

And the stay was denied.

The interesting part of that is that these people that [848] have fought the fees so hard and were so proud of the merits of their seizure were afraid to abide the events of that appeal. We now had some finances and we were going to a trial on the merits, and they didn't dare face those merits. They gave back the institution and they dismissed the appeal. That is the result of financing the litigation just to the point where it can be tried. They are afraid to face the issues.

I wouldn't be the slightest bit surprised, if your Honor gives the finances for a trial on the merits to the Los Angeles Bank to see them give the bank back rather than dare face the issues on the merits in that case. They are wonderful in dashing to courts and complaining that for four years there hasn't been a trial, but when it comes right down to it they would rather give the Long Beach Association back rather than go to a trial on the merits.

It is true they tried to get it back a couple of years later. They thought they would get it back a few years later, but this time they didn't dare defy your judgment. They had to give some notice. There had to be some due process. Now we are fighting that all over again.

The real question before you is just about the question that was before you when you made the allowance to Mr. Westover. Is there to be due process or isn't there? I would like to read you

from that stay order. I think it was one of [849] the most decisive orders in the litigation because when that became final from the Circuit's refusal of a stay in December——

The Court: I remember it. I got it out and read it this morning.

Mr. Chapman: I would like to put it in the record, your Honor. We may be upstairs again some day. I don't like to bore you with it, but we were up there just two weeks ago and I think it is a good idea to have a fair record. They even tried to cut our designation of appeal on the record of this appeal. They said, just listen to our side of the case, Circuit Judges.

The Court: Are you going to read the whole order?

Mr. Chapman: No, just about four or five lines. It is page 6 of official page 3239 now for appeal, starting at line 2:

“It further appearing that the assertion of the rights and claims by the plaintiffs did require and does require that they and counsel take an active part in the litigation and the incurring of enormous expenses for the preparation of pleadings (which in this case have been voluminous, multiudinous court appearances, for the preparation and printing of records and briefs on appeal, and other incidents to litigation; that it presently [850] appears that the within action was commenced and is maintained by the plaintiffs in good faith for the avowed purpose of protecting and preserving the rights, interests, assets and properties in said association of

themselves and others similarly situated, and that due process of law for ultimate justice requires a trial and determination on the legal merits, or both legal and factual if the issues are not disposed of on the legal merits alone, and that in view of the whole record and files herein it would amount to a denial of due process to compel plaintiffs to pay the expenses and counsel fees heretofore allowed or to compel plaintiffs and counsel to await the final determination of the issues of said litigation for the payment of said fees and expenses; * * *"

That was literally for the Long Beach Association.

The Circuit approved it and they dismissed the appeal after the Circuit hearing when they ran out of courts and couldn't delay the payment of fees any more, and once we were financed they were afraid of a trial and gave the Association back.

Now I think this is vitally important on this point. I notice counsel have suggested that you make a personal judgment against the San Francisco Bank. Well, it is their attorney [851] fees and their application and I probably shouldn't talk about it, but I think we are concerned——

The Court: No, I do not think counsel has asked for a personal judgment.

Mr. Works: By no means.

Mr. Chapman: I am glad I misinterpreted it.

The Court: He asked for an order on the funds, a personal order directing them to pay it.

Mr. Works: Either against the impounded funds or the general assets as your Honor feels proper. I

was merely talking about jurisdiction, that you could follow either one of two courses.

Mr. Chapman: It is my belief that the law of this case has been established, not only for the Long Beach Association but for the Los Angeles Bank, that you can pay money to the class plaintiffs out of their assets in court, and that even a stay won't touch it if you do. Now if you vary from that I think you bring a new point into the award, that while it might be sustained I think we would be weakened.

The Court: You mean out of the assets in court?

Mr. Chapman: The assets in the registry. Those assets consist of the four notes——

The Court: You mean you are suggesting that it is doubtful that Mr. Works' position is correct legally that I can make a personal judgment against the San Francisco Bank [852] directing it to pay money in their possession belonging to the association and about which this litigation is concerned?

Mr. Chapman: I don't think it is doubtful, but I don't think it is as strong. It isn't the law of this case, the way the former award was made. And I am reminded very much of my own fee application and that of Mr. H. O. Wallace—he since died in Washington, as you remember, in fighting this case—both of us were coming up in the afternoon. You had allowed Mr. Westover \$50,000 in the forenoon and we were thinking, well, it looks like the litigation is going to be financed, and feeling rather happy about it, and we came back in the afternoon and you put my application and Mr. Wallace's ap-

plication off calendar and, to put it mildly, we were severely disappointed.

But the wisdom of your Honor's action in not making an award to the seized association or its counsel pending the restoration of that association was demonstrated when the writ was taken to the United States Supreme Court and we fought the fee issue there, because in allowing to the corporation itself there could be a question whether or not that involved the legal existence of the corporation.

In other words, there was a question as to whether 5082, 3, 4 and 5 were valid or not valid. But if you allowed it as a class there could be no doubt about that under any circumstances. Had you allowed it to our Association there might [853] have been some doubt in our case whether Ammann would try to reach for that award and control it. If you allow it now to the Los Angeles Bank there could be some doubt at some later happening in this litigation whether the San Francisco Bank wouldn't try to grab and control that award, as they have tried to control the \$46,000,000 that they seized. But if you allow it to the class shareholders of the Los Angeles Bank, as you allowed it to Mr. Westover and the class of the Long Beach Association, it is impossible for any seizure to reach that.

In other words, the defense fund, the fund to test the validity of this confiscation, remains beyond the control of those who seized the rest of the Los Angeles Bank's assets. I say that either position is legally strong, but that the strongest position should be taken. I haven't the slightest doubt but that if

your Honor makes any allowance of any kind that there will be proceedings taken. I don't know whether they will try to make you a defendant again as they did the last time or not. They might have learned a lesson from last time, but there is no telling. In any event, I think that the law of the case should be followed.

Now the seizure of the Los Angeles Bank was before the Supreme Court in *Mallonee vs. Fahey*, the third-party complaint which I filed on the 1st of July, 1946.

The Court: They did not pass on the issues in that, [854] though.

Mr. Chapman: They did not, that is correct, but nevertheless in the opinion there is a mention of a prior seizure and very significantly in the briefs on appeal the gentlemen who seized both institutions asked that that third-party complaint be stricken and dismissed, and they didn't get it. The remand came on back down for all proper proceedings.

When you ask the Supreme Court for something and you don't get it, you can say, oh, it wasn't decided, but I think that the mandate and the remand are just as much part of the Supreme Court proceedings as the opinion and, as Mr. Westover has read, the mandate was for further legal proceedings in conformity with that opinion, which included the award of \$50,000 to try the Long Beach litigation. I don't doubt but that people are going to say, why am I concerned with all this. I don't think it is necessary to go into the history of that. Our pleadings show that we were seized because we re-

sisted the Los Angeles Bank confiscation, and your Honor's point on attorney fees is exemplified in the congressional committee's report. Reading now from page 22:

“After a full probe of the grounds upon which Mr. Fahey appointed Mr. Ammann as conservator he conceded that he had appointed a conservator because of the \$100,000 appropriation, characterizing it as an unreasonable and exorbitant amount to [855] be spent for that purpose.”

Actually there was a \$100,000 appropriation and a \$50,000 check. That check came before you in interpleader less than two weeks after the institution was seized, almost as soon as there was a court action in which we could deposit the check, and we tendered the issues of that check on our attorneys' fee applications.

They said they seized us for that proposition and would they submit those issues to you for decision? The records show what happened on the fee applications. They said no court can do it, nothing on the merits, not even a word of denial of the seizure, nothing on the value any more than there has been on the Los Angeles Bank—just nobody can have any power over us. We are immune from the courts.

When you said, no, I can award enough to have a trial on the merits, they tried direct to the Supreme Court, they tried direct to the Circuit, and they lost in every Federal court that they could get in on the question of fees.

Now if your Honor is determined to make an

award—and I think an award is proper and should be made—I think you ought to follow the path that we tried to blaze through those court proceedings. It was hard work. It took a lot of nights and a lot of holidays and a lot of Sundays. And it has been followed now by us the second time, and they finally abandoned their fight on it only because we apparently believed [856] too much of the new Board. We thought they meant it when they said they would settle if they gave us part of our fees. And the very jurisdiction they conferred on you in their letter, when they said in adversary proceedings the court is to determine the matter, that isn't even worth the paper it is written on. But I think I am getting a little into the merits now.

The law of the case as to class plaintiffs would also indicate to me one other thing, that the award should come from assets in the court about which there can be no question that these plaintiffs have ownership. In other words, the four notes for \$6,-300,000 were created by San Francisco taking seized Los Angeles Bank assets and lending them to Ammann. I haven't any doubt on the trial of the merits that those specific assets can be traced. I don't think we have to do it for a fee application. But all that there was in the San Francisco Bank was the \$46,000,000 they seized on the 29th of March from the Los Angeles Bank and the \$9,000,000 of Portland assets that they mixed up with it. Out of that they loaned \$7,300,000 less than seven weeks later, and that is the assets that went into those four notes. We deny any liability on those notes,

and your final judgment may well say that we don't owe anything on those notes. But the present awards, at least in the amounts suggested by the experts, are less than 5 per cent of the assets in there. I [857] think actually the percentage is lower than 5 per cent.

The Court: What is the total amount of fees that have been allowed to date?

Mr. Chapman: Including special master expenses, costs and everything?

The Court: Excluding the special master.

Mr. Chapman: Excluding the special master, about \$265,000 in round numbers, your Honor. That may vary as much as \$2000 one way or the other.

With the special master included I think it comes very close to \$300,000, which is still minor in litigation that has gone as far as this has and lasted as long as this has.

Now following my suggestion through, if you make an award, whatever amount it may be, and determine now that that shall, in the final accounting, come out of the \$6,300,000 in notes, it is bound to be out of the assets belonging to the class. I can't say out of the assets belonging to the Los Angeles Bank, I don't know how the litigation will come out, but certainly these applying stockholders, the five plaintiff associations represented by Mr. Works and the one represented by Mr. Gilbert, are going to represent the class of either Los Angeles Bank stockholders, San Francisco Bank stockholders or Portland Bank stockholders, and that is all the classes there can be, and they are the real owners

of the assets represented by the \$6,300,000 in court, because a corporation [858] and its officers and directors are only trustees. They don't own the assets, they are administering them for the true owners, the stockholders, and that is the doctrine that I think prevailed in the Long Beach case.

Certainly when you allowed Mr. Westover on behalf of his 16,000 depositors some of their own money, there couldn't be any doubt whether Ammann was validly appointed or invalidly appointed; it was the shareholders' money, and if you allow something to the class represented by Mr. Works and Mr. Gilbert and Mr. FitzPatrick, no matter which bank there is, there can't help but be the money of the stockholders of that bank.

Now another point arises. If you award it out of the assets in court your judgment is not subject to a stay by the Government. They call themselves—I don't like that word "government"; I respect my Government, but the defendants who committed these seizures—they can't just by filing an appeal stay that judgment because it is an order from you to your clerk. It doesn't require the United States Marshal to go out and levy an execution. You simply make an order to your clerk to pay these plaintiffs some of their own money so we can try this litigation. If they want that stay they have got to apply to you for the stay and if you deny the stay and they appeal somewhere they have got to try in the appellate court for that stay, and they don't get the [859] stay even if they want to post a bond for it. It takes an order of yourself or of one

of the Justices of whatever appellate court they go to. I think that is why they took the writ the first time. It didn't cost a dime to tie the thing up for four months more to see what they could do on the writ.

Your Honor, I am confident that due process will prevail in the Los Angeles Bank case as it has in the Long Beach case. I think the very fact that they returned the Long Beach Association under the pressure of the litigation fund justifies and furthers the fact that the Los Angeles Bank should have money allowed to its class plaintiff shareholders to test the merits of that confiscation, because if you don't all you are doing is saying, don't ever give notice, don't ever give due process, just confiscate the assets and if you take everything they have got they can't ever litigate it.

That ends my argument, your Honor.

Mr. Works: Your Honor, I had thought I was through but apparently everything that I have been saying today has been misconceived. The application of the Los Angeles Bank is based upon the proposition that it was depriving the Bank of the means of defending itself. The whole due process argument, the cases we have cited, runs in favor of the despoiled party who is attempting to avail himself of the rights of due process. We feel by all means that the award should be [860] made to the Bank and that will inure directly to the benefit of the member stockholders, and there you have an undoubted due process right which is a higher right

than the ordinary trust fund doctrine exemplified by cases such as the Greenough case.

The Court: What is the difference? The award is to be made to counsel. Counsel are appearing here as attorneys in a class suit. If I make any award, I am not going to say, well, you get \$8.50 for representing the Los Angeles Bank and \$5.30 for representing the other plaintiffs.

Mr. Works: I know, your Honor. I have this thought in mind—perhaps I am wrong; I quite frequently am—but I have seen authorities which indicate that in cases of this sort the award should be made to the client and not directly to the attorneys.

The Court: Should be made to the client?

Mr. Works: I have seen cases to that effect. Now I don't know what your practice here has been.

The Court: I have made the awards to the attorneys.

Mr. Westover: Ours was made to us direct.

Mr. Chapman: Always to counsel in this case so far.

Mr. Westover: Ever since the Richfield case came through this court.

Mr. Works: It has been done both ways and I may be wrong. Now if it is made to counsel for services rendered in [861] connection with the case, that is one thing.

The Court: If there is any award made, it does not seem to me as though I should make it to the client because then if I make it to the client it leaves it up to the client finally then whether or

not he is going to give it to his lawyer or stick it in his pocket. I do not mean to suggest that that is present here, but the award is to counsel for services.

Mr. Works: Then your Honor answers most effectively both Mr. Chapman and myself because he was pleading for an award, as I understand it, to the class plaintiffs, the Association. Now if the award is made to counsel for services rendered in this case——

The Court: It is counsel's application, is it not?

Mr. Works: It is a motion made by the bank and by the member associations for an award of attorney fees for services rendered by counsel, as your Honor has pointed out.

The Court: Mr. Gilbert, do you have any rebuttal?

Mr. Gilbert: Your Honor, I have perhaps a minute and a half or two minutes.

The Court: Where are your applications?

Mr. Fitting: January 7, 1949.

The Court: January 7, 1949?

Mr. Fitting: Yes, about then.

The Court: Is that Mr. Gilbert's? [862]

Mr. Fitting: No, that is O'Melveny & Myers and Mr. FitzPatrick.

The Court: What was the date of your application, Mr. FitzPatrick?

Mr. FitzPatrick: January 5, 1949.

The Court: On January 6, 1949, there was a supplement to that, was there not?

Mr. Works: Yes.

Mr. FitzPatrick: Yes, there was.

Mr. Fitting: That was about July 11, if the court please.

The Court: I think the clerk has that now. Now, if I can find Mr. Gilbert's.

Mr. Gilbert: That was in early February, your Honor.

The Court: Your request for allowance of fees is to June 30, 1949.

Mr. Works: I was laboring under a misconception. The motion was made by the Bank and the member associations, which I think is proper for an order directing payment to the attorneys in conformity with the practice in this case.

I was under a misconception as to who should make the motion and who the payments should be directed to. Now, your Honor, upon that basis, if an award should be made, we have no objections whatever, as I have indicated before, to it being paid out of the funds in the registry, if your [863] Honor cares to do it that way. I agree with Mr. Chapman on that.

The Court: Very well.

Mr. FitzPatrick, do you want to make an argument?

Mr. FitzPatrick: No, your Honor. Silence is golden.

The Court: Mr. Gilbert?

Mr. Gilbert: Our request was the same.

The Court: Where is your affidavit, Mr. Gilbert?

Mr. Gilbert: The affidavit was filed at the same time.

The Court: Affidavit showing your hours worked, and what not?

Mr. Gilbert: Yes, your Honor.

The Court: I do not find it on that date.

Mr. Gilbert: It may have been filed a day or two later.

The Court: Yes, February 20. All right.

Now, you said you had two points that you were going to make in two minutes.

Mr. Gilbert: Or less, yes, your Honor.

The first one was with reference to a remark made by Mr. Fitting and a number of counsel. I just wish to invite your Honor's attention to *Winslow v. Ferguson*, 25 Cal. 274—incidentally, that was the case in which Mr. Tremaine had been awarded an interim allowance—on page 284, where the court pointed out that even though counsel may appear for only one claimant he still, other things being equal, is entitled to [864] be paid counsel fees.

Secondly, your Honor, I had intended to mention this and overlooked it, but your Honor recalled the opinion this morning with respect to the denial of due process of law if counsel fees are denied. Your Honor wrote that opinion and filed it September 30, 1947, in connection with the order denying application for stay of execution.

The Court: That is the one that Mr. Chapman just read?

Mr. Gilbert: Yes.

And, lastly, your Honor, I would like to remind you of these facts, and which appear in the con-

gressional report, from which it appears that on March 15, 1946, the Los Angeles Bank made an appropriation to defray legal expenses in connection with the congressional hearing in Washington, on March 18th, that information reached Washington, and on March 29, they were taken over.

Other than that, your Honor, I have no other or additional argument at this time.

Mr. Dusenbery: May it please the court, I would like to ask one or two questions to try to clarify this in my own mind on one or two points which Mr. Chapman made in that most astounding argument that he has just concluded.

The Court: I have never seen lawyers so surprised at what the other lawyers say.

Mr. Dusenbery: One point is this: I would like to ask [865] him whether he is suggesting in that argument that if any award is allowed on these fees that it be paid out of the collateral securities which are in the registry of the court under the impound order relating to the \$6,300,000, of notes and \$5,300,000, of bonds and the \$1,000,000-odd cash that has been earmarked as collateral security for those notes in that so-called interpleader impound proceedings. Is that your suggestion?

The Court: I do not know that they are earmarked. Maybe they are. There was a substitution of collateral made.

Mr. Dusenbery: That is what I am referring to, your Honor.

The Court: I do not know whether they are earmarked.

I understand Mr. Chapman's position. If I understood it, it was that the allowance instead of being assessed out of the funds claimed by the Los Angeles Bank and the members of the class now in the hands and possession of the San Francisco Bank, that it would be ordered paid out of the funds on deposit in this court which are up as security for any obligation to either the San Francisco Bank or the Los Angeles Bank in a proceeding that it ultimately should be assessed against that fund.

Mr. Dusenbery: Is the Long Beach Association consenting to the use of that collateral security for that purpose?

Mr. Chapman: Mr. Dusenbery, we are suggesting that the [866] court has the power to award attorney fees and by not making any opposition we certainly want to have some say in the order and expect to participate in the drafting of it if there is an allowance of any order. But in so far as consenting that an allowance for the Los Angeles Bank come out of the assets of the Los Angeles Bank, the answer is yes.

The Court: His point is that you consent that they be paid out of money of the Long Beach Association.

Mr. Chapman: No, absolutely not.

The Court: Very well. That is his question.

Mr. Dusenbery: Are you consenting that they

be paid out of the collateral security in the impound to which I referred?

Mr. Chapman: If we are given an offset against the \$6,300,000, certainly.

Mr. Dusenbery: Are you asking the court to make that offset?

Mr. Chapman: I am going to await a ruling.

The Court: His request was that at this time the court determine. In other words, if I understood his position—and I tried to follow it—it was this, that the allowance be made out of funds in court but that they should not be made out of money belonging to or ultimately to be paid by the Long Beach Association.

Mr. Chapman: That is right.

The Court: Is that not correct? [867]

Mr. Chapman: That's exactly it.

Mr. Dusenbery: Are there any funds that would answer that description, your Honor? I know of no such funds.

The Court: You just asserted a claim to \$6,000,000, in bonds and \$1,000,000, in cash.

Mr. Dusenbery: We do, your Honor. The bonds in this impound we claim to have a lien on them. We recognize the general property ownership in that collateral belonging to the Long Beach Association. We have them as pledgees as security for our notes. That is why I was trying to find out and clarify the point as to whether or not the Long Beach Association is now waiving its general property interest in that collateral security and permitting it to be paid over for attorney fees.

Mr. Chapman: This lien that they claim they have they got from Ammann. I don't think they got anything.

The Court: I understand counsel's position. His answer to your question of whether or not he consents to payment out of the assets in court of any money belonging to or that will ultimately be paid by Long Beach, is no.

Mr. Chapman: That is right.

Mr. Dusenbery: I was going to say yes a moment ago. The answer is now no.

The Court: He said no to me a while ago.

Mr. Dusenbery: To me it is a confusing sort of position, [868] your Honor, and I was just trying to clarify it so that we would know where we stand on it.

The Court: Very well.

Mr. Dusenbery: One other question I would like to ask, if I am permitted. Is counsel suggesting that any award that your Honor make on these fees should be made in such a manner, as I understood he suggested in his argument, that it would be impossible for the San Francisco Bank to appeal from that order or to obtain a stay or to put up a supersedeas bond or anything that would protect their right to have a review? Is that the suggestion that counsel made?

The Court: I do not think he needs to make his argument over again, counsel. I heard it. I understood it.

Mr. Dusenbery: Very well.

The Court: Anybody else?

Mr. Fitting: I am not going to take up the court's time, but I just want to say that I am not going to take the court's time to answer Mr. Chapman's thoughts and his insinuations, but just to say that we deny them, we stand on the record as it is, on the statutes and the regulations as they are, and have been during the course of this litigation.

The Court: Is everybody all through? Has anybody else anything to say? (No response.) [869]

MEMORANDUM OPINION

The Court: As you have gone along here, I have tried to write down a little memorandum, and during the recess I have examined the matters that were pertinent and the cases which have been cited. I have had particular reference to the case of Winslow v. Ferguson, which I read this morning, Sprague v. Ticonic Bank, Eggert v. Pacific States, Fahey v. Mallonee, and another case or two that I will shortly advert to.

The first thing that strikes me about this application for attorney fees is this—and every time we have had a hearing I have been conscious of the fact—that there was extremely widespread notice of this application for fees, both so far as O'Melveny & Myers and Mr. FitzPatrick are concerned, as well as Mr. Gilbert. Notice was sent to every association and every person who could possibly be interested in the disposition of any money, either in court or in the hands of the San Francisco Bank or the Association, and the total and absolute ab-

sence of any objection or protest or appearance except on the part of the San Francisco Bank and the official defendants who have been here. None has come to the records of the court, none has come to the attention of the court, none has been filed with the clerk, nobody has appeared in this courtroom at these repeated hearings, at the beginning of them or since, even in spite of the widespread actual notice to the various parties and the published [870] notice which was required in the newspapers.

I say that because of the fact that again it appears that the people who are really interested, except for the Shareholders Committee and except as they represent the shareholders in the Los Angeles Bank, are not in this litigation. It is a quarrel apparently over power. I just want to make that as a preliminary remark, but it cannot be repeated too often in connection with this case.

The first question to be decided is whether or not the plaintiffs are entitled to any fees at all. The respondents have urged here that there must be success before there can be any allowance but, as I have indicated during the course of the argument and as I previously indicated in connection with the other applications for fees, that in my judgment is not a holding of the cases at all, and it is specifically indicated to the contrary in *Sprague v. Ticonic Bank*, and it seems to me that that is the inevitable conclusion of *Fahey v. Mallonee* arising in this very case.

I think that counsel is correct in saying that the measure of whether or not a person is entitled to

attorney fees on an interim allowance, or on a final allowance, is whether or not there was good faith and reasonable grounds. As always in a case of this magnitude, and as vigorously opposed as this is, it is difficult for counsel and for the court not to get onto a discussion of the merits. It has been necessary, [871] in connection with determining whether or not there was reasonable grounds or good faith, to at least give consideration to what the merits were in this case.

I do not think it is completely without significance that in *Fahey v. Mallonee* the court commented as follows, at page 257:

“One of the allegations of the complaint is that it was intended that this institution would be merged with other institutions to the injury of its shareholders. The allegation seems to be based on the fact that a different institution with which the management of the Long Beach institution was connected was merged by the authorities in a way that was highly objectionable to some of the shareholders and aroused concern of the public authorities. We find no explicit threat to merge the Long Beach institution and there is no such finding by the court below. The Government has assured us at the bar that there is no plan for such a merger in contemplation. Nevertheless such a merger was enjoined. In view of the absence of a finding of the threat or of evidence to sustain one, we accept the Government’s assurance that merger will not follow and, hence, we do not consider it necessary to discuss the legality of [872] hypothetical mergers.”

In this case there is no hypothetical merger and, borrowing the language from those who went to law school much later than I did, I should say that the rationale of what I have just read is to the effect that if there had been an explicit threat to take the Long Beach Association and merge it with another, or liquidate it and dissolve it completely, as was done in the Los Angeles Bank, that the Supreme Court would have reached a different conclusion.

In other words, it seems to me that that language supports the proposition that there certainly is reasonable ground, or was reasonable ground and still is reasonable ground, for the plaintiffs in the original case and for Mr. Gilbert and his client disassociating itself from its co-plaintiffs in the other case, to believe that they had a good lawsuit and which had merit and which should be tried on the merits. I do not think there is any question of the good faith, that is speaking as a personal thing, of counsel.

But another case strikes me as being significant in connection with determining whether or not there is reasonable grounds. We have to keep in mind the text of Section 26 that I just read which, in spite of its apparent broad grant, nevertheless did have some limitations, and it could be very easily urged and logically and in good faith urged, and is done so by the plaintiffs in the case who are now seeking allowance [873] to their counsel for fees, that there was not compliance with the law as it stood and that the Home Loan Bank Board and the defendants in that case, which is consolidated with

this case, violated the law, that they exceeded their lawful authority.

In *Land v. Dollar*, 330 U. S. 731, the defendants in that case in the court below were present and former members of the United States Maritime Commission. It involved a dispute over some stock which had been endorsed in blank to the Commission. The contention arose as to whether or not the plaintiffs in the court below were entitled to have their stock back and they instituted a suit. The District Court dismissed it on the ground that it was a suit against the United States, and the Circuit Court reversed it, and it went to the Supreme Court and the Supreme Court affirmed the Circuit Court in holding that the complaint stated a cause of action which, after all, is the test of whether or not there is reasonable grounds, and I have held in this case that the complaint stated a cause of action which would be sufficient to support my conclusion in that respect, but I have deemed it wise, in view of the vigor with which counsel have argued the matter and presented it, to add these few remarks.

At page 735 the court said:

“The allegations of the complaint, if proved, would establish that petitioners (that is to [874] say, the Maritime Commission, the officials of the United States) are unlawfully withholding respondents' property under the claim that it belongs to the United States.”

There is no distinction between the property belonging to the United States and a right to do something under the laws of the United States.

“That conclusion would follow if either of respondents’ contentions were established: (1) that the Commission had no authority to purchase the shares or acquire them outright; or (paraphrasing the language, if the Home Loan Bank Board had no authority to dissolve the bank and liquidate it and transfer its assets as alleged without consideration and without assumption of liability) or (2), that, even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares.”

There is nothing in the second feature which is involved in this case.

“If respondents are right in these contentions (the respondents were the plaintiffs below), their claim rests on their right under general law to recover possession of specific property wrongfully withheld.” [875]

That is the contention of the plaintiffs here in this case, that they are entitled to recover possession of specific property wrongfully withheld and to settle their right and claim to it.

Further on page 736, in speaking of *United States v. Lee*, the court said:

“And it concluded that an agent or officer of the United States who acts beyond his authority is answerable for his actions. (Citing the now familiar cases of *Philadelphia Co. v. Stimson*, 223 U. S. 605, and *Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U. S. 549.)

“Where the right to possession or enjoyment of property under general law is in issue, and the de-

fendants claim as officers or agents of the sovereign, the rule of *United States v. Lee*, *supra*, had been repeatedly approved. (Citing a list of cases.)” Continuing:

“For if we view the case in its posture before the District Court, petitioners, being members of the Commission, were in position to restore possession of the shares which they unlawfully held.”

Then again on page 738:

“But public officials may become tortfeasors by [876] exceeding the limits of their authority. And where they unlawfully seize or hold a citizen’s realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.”

And there they held that the complaint stated a cause of action, or applying that reasoning here, if there had been an application for fees they certainly held that there were reasonable grounds and that the action was brought in good faith so as to entitle it to stand up as against a motion to dismiss. And cases which support the proposition that a party is entitled to litigate and is entitled to enforce by an action against the persons who are taking it away from him are, of course, *Williams v. Fanning*, *Ickes v. Fox*, and the other cases that are frequently cited.

I do not wish, and I have said heretofore that as far as I am concerned one of the great difficulties in

this case is to keep my eye on the ball and to avoid making any decision which will prejudice the merits of the case, but certainly it seems to me from what is before the court in the law, what is before the court in the pleadings and what is before the [877] court by way of files and records and of evidence, that the plaintiffs certainly have reasonable grounds for believing that they had a good cause of action and for maintaining their suit. Their rights to maintain the suit as to the establishment of the Bank have been vigorously contested every step of the way. And for the same reason it seems to me that the action must be said to have been brought in good faith.

I cannot find anything in any decision which says that counsel is not entitled to an interim allowance on attorney fees and, as I indicated before, the cases which I cited, *Sprague v. Ticonic Bank* and *Fahey v. Mallonee*, were authority for the allowance of fees on account.

I conclude that they are entitled, both O'Melveny & Myers and Mr. FitzPatrick, and Mr. Gilbert, to interim allowance of fees on account over the responses and objections urged against them.

The question next arises as to against whom they shall be assessed. I was impressed by Mr. Chapman's argument. I think that the fees that I am going to order allowed should not, under any circumstances, come out of the Long Beach Association except as the Long Beach Association may be a shareholder of the San Francisco Bank or the

Los Angeles Bank, whichever is ultimately decided to be the correct legal entity. [878]

I was first impressed by Mr. Works' argument that I could make an order, and I am satisfied that he is correct, as a matter of law. However, it seems to me that Mr. Chapman's suggestion is perhaps the most practical one, and for that reason I am going to order the fees that I allow paid out of the money on deposit with the clerk of the court, and further order that they shall not be paid from funds which belong to the—I do not know that I can say that—which belong to the Long Beach Association. Perhaps it would be better to say that they shall not be paid so that they shall be assessed ultimately against the Long Beach Association or its assets; that they shall be paid from the funds in court and if at any time the amount of money in court which belongs to the Long Beach Association is less than a sufficient amount to act as security for the notes that are here, the Long Beach Association shall not be ordered and directed to deposit that additional amount to make up that money.

In other words, the money shall be paid out of the funds in court which are ultimately held to belong either to the San Francisco Bank or to the Los Angeles Bank, whichever shall be the legal entity and the one who finally prevails, and not out of any funds which belong to or are ultimately found to belong to the Long Beach Association which are now on deposit in court.

I come now to the question of how much—the \$64 question. [879] And it is a \$64 question as far

as any judge is concerned. I doubt if any counsel here would know precisely what to do were he sitting in my position.

I have come to a conclusion concerning it which is a general one, which I will first announce, and that is that I shall not make a finding as to the total value of the services to the dates requested. That is to say, in so far as O'Melveny & Myers and Mr. FitzPatrick are concerned, to June 30, 1949; and as far as Mr. Gilbert is concerned, to and including February 27, 1950.

I think I might like to add generally here that if I did not come to the conclusion of the allowance of interim counsel fees a way would be discovered by those acting under the color of law to completely deny due process to anybody who might be doing business with them by simply seizing their property and say, "Well, you deposited your money in the Farmers & Merchants Bank and it is a member of the Federal Reserve System and the Federal Reserve Board has the power to do this and that, but you cannot even come in and litigate about it."

Moreover, as far as estoppel is concerned, I cannot see that there is any estoppel in fact nor can I see—or let me say this—that it is one of the issues in the case ultimately to be decided, as to whether or not there was any estoppel in law. [880]

We come back to the question which is so hard to decide. The uncontradicted testimony before the court is that the worth of the services of O'Melveny & Myers and Mr. FitzPatrick totaled the sum of

\$175,000. Now, against that I believe they were paid some money. How much was it?

Mr. Works: \$10,000, your Honor.

The Court: That was the total to the two?

Mr. Works: Yes.

The Court: Any allowance I am going to make I am going to make to the two of you.

Mr. Works: Yes; I understand.

The Court: As one allowance.

You were paid \$10,000?

Mr. FitzPatrick: Yes, your Honor, both of us. Not apiece but a total of \$10,000.

Mr. Works: \$5000 to each.

The Court: And, Mr. Gilbert, you have not been paid anything?

Mr. Gilbert: No, your Honor.

The Court: I will make an interim allowance for O'Melveny & Myers and Mr. FitzPatrick and W. I. Gilbert in the total sum of \$75,000. I will find as a fact that the value of their services exceeds that amount, but I will not make any finding as to the total value of their services.

\$7500 of the \$75,000 is to be paid to Mr. Gilbert and [881] the balance to be paid to O'Melveny & Myers and Mr. FitzPatrick as one allowance to be adjusted between themselves.

Anything else?

Mr. Works: Shall we prepare an order and submit it, your Honor?

The Court: Somebody will have to.

Mr. Dusenbery: May it please the court, I would like to state for the record that the San Francisco

Bank will desire to take an appeal from your Honor's order, and we are prepared to put up the usual supersedeas bond in order to stay the judgment.

The Court: Let us wait until the order is signed and entered before you file a notice of appeal.

Mr. Fitting: Will we be given the usual 5-day notice, and copies of the proposed order and findings will be served upon us?

The Court: No one has failed to do it yet in this case that I know of.

Mr. Fitting: I just wanted to make sure that this order came under that rule.

The Court: It does.

What is that rule number about final appeal?

Mr. Fitting: Rule 7 of the rules of this court.

The Court: No, FRCP.

Mr. Chapman: Rule 54(b), I believe. Let me check. [882]

The Court: Do you wish to be heard in connection with that?

Mr. Works: We request a final order, your Honor, if that is the question your Honor has in mind.

The Court: The rule says when more than one claim for relief is presented in an action. I do not know whether this comes within that rule or not, but I have deemed it wise to try and follow it.

Mr. Works: This is an ancillary petition in equity, I suppose.

The Court: It is an ancillary petition in equity for a judgment, but this is not a final judgment be-

cause I am only making an interim allowance on account of attorney fees and am not making any final judgment as to the total value of those fees.

Mr. Chapman: Your Honor, regardless of Rule 54(b) there are recent holdings of the United States Supreme Court—I don't happen to have the citations with me at the moment—but it came up in a New Jersey stockholders proceedings for indemnification of directors and it was held to be an appealable order.

Mr. Works: I should think it would be, your Honor.

The Court: You can make up your own mind whether or not you want to follow the provisions in connection with Rule 54(b). [883]

Mr. Works: We will give some study to that.

The Court: In making the allowance of \$75,000, on account I have, of course, taken into consideration the fact that Mr. FitzPatrick was paid \$5000 and O'Melveny & Myers were paid \$5000 as well.

Mr. Dusenbery: May it please the court, in view of the fact that the order, I assume following your Honor's opinion, will provide for payment out of funds already in the registry of the court under Rule 73(d) providing for stay, I think it would be necessary for the court to fix the amount of a stay bond. Apparently the fund will remain there during the appeal, and under the latter part of that provision the court fixes the amount necessary for the bond.

The Court: I am not going to do anything more about that order until I get the order before me and

it is signed. Then the time begins to run to the appeal. There is also a provision in the law that the judgment is automatically stayed 10 days, and if you want a further stay you can make up your mind then and come in and present an order and I will make a determination. But I am not going to make any determination on that now.

Mr. Bishop?

Mr. Bishop: Your Honor, my understanding is we are at liberty now to take all the records of the Bank back to the Bank for further disposal by the special master, except the [884] one exhibit which the court expressed it desired to retain in the records.

The Court: I do not desire it, but I do not see any need of the Bank for it. The Bank is not going to go broke without that hotel bill.

Mr. Bishop: That is right.

The Court: My understanding was that the records are down here actually in the physical custody of the Bank but technically in the custody of the special master.

Mr. Bishop: At this moment.

The Court: That they were produced to the special master.

Mr. Bishop: Yes.

The Court: My order will be that they will be returned to the special master.

Mr. Stacey, my clerk, said this morning that he did not know whether he would be able today to complete the marking of these exhibits or not. Have you done so?

The Clerk: They are all marked now, your Honor.

The Court: Very well. Then you can take them tonight.

Mr. Bishop: And I will call Mr. Chapman about the photostating arrangements if any questions arise, because he is the one who will have to be satisfied.

The Court: And they will not be released from the special master until photostats are furnished to the clerk. [885]

Mr. Bishop: I understand that.

The Court: In other words, they are still in the custody of the court and in the custody of the master and they cannot be released from him until the clerk gets his copies. After that it is up to the master and his proceedings.

I want to apologize to all you gentlemen for keeping you here on Good Friday and on this day before Easter, and I want to thank you for giving up your time to be here. It enables me to proceed with other matters which have been pressing and need to be litigated next week.

Mr. Westover: We appreciate the time you have given us on Saturday and Good Friday.

Mr. Gilbert: We also appreciate it.

Mr. Works: We also want to thank you.

Mr. Angell: Thank you, Judge Hall.

(Whereupon, at 4:50 o'clock p.m., court was adjourned.) [886]

The Court: All the objections of the Bank which deal with that seem to me can be overruled and have no basis and present nothing new, except No. 7, which puzzles me a little, which is on page 7 of their objections.

Mr. Angell: Does your Honor wish us to clarify that?

The Court: Maybe. Not yet. But I was thinking about that, and when I first read it I could not see that you had any basis at all for the objection, but upon reflection it occurred to me—and I may not be correct in this respect—that so far as the Long Beach Association is concerned, it is claiming that it owes neither the San Francisco Bank nor the Los Angeles Bank any money.

Mr. Chapman: That is right.

The Court: That it is entitled not only to all of the funds in court but also to a cancellation of the note.

Mr. Chapman: That is right.

The Court: And the return of all of the bonds which are deposited as security. And if that did ultimately occur, then [887] there would be no funds in court except the Long Beach Association's. Is that not your basis of objection?

Mr. Angell: That is one hundred per cent correct. All we have is the notes, which are claimed by the Association to be void because Amman had no authority to make them, and if that be true and the Association ultimately prevails on that, then the security securing those notes falls with the void notes.

The Court: The question was touched on a little bit in the arguments, or someplace along the line, to the effect that this would be a personal judgment against the San Francisco Bank.

Mr. Works: I raised that point, your Honor. It seems to me that you have jurisdiction in rem over every stick of property that they took from us, and you have jurisdiction in personam over them to require direct payment, if you care to do so.

As to this particular point, it seems to me, however, that it is one which the San Francisco Bank may not arise. Possibly Long Beach might if they cared to. That is up to them.

Mr. Angell: We are only trying to be helpful, Mr. Works.

Mr. Works: This is a sort of a hamstringing help.

Mr. Angell: I think it is the duty of counsel to point [888] out to the court any jurisdiction which may ultimately raise very difficult questions.

Mr. Works: We see your point all right.

The Court: This would not be a final judgment in the event that I reserved in this judgment the ultimate assessment of that money, would it?

Mr. Works: No.

Mr. Angell: It cuts just a little deeper than that, your Honor.

The Court: What everybody wants here is a final judgment, is that not right? I mean, you want a final judgment so that if the money is paid to you you will not have to five years from now to pay it back.

Mr. Works: That is right.

The Court: And you want a final judgment so you can appeal from it?

Mr. Angell: Yes.

Mr. Bishop: There is one other point. We feel that this case isn't poised at this time for a final judgment.

Mr. Chapman: If your Honor is interested I would like to give you the Association's position on that.

Mr. Works: I would like to have it.

The Court: Yes, I am interested.

Mr. Chapman: We feel that there is a marshaling of assets and accounting and many equitable proceedings, part of [889] which have already been done with final judgments and a vast part of which yet remains to be done. There can be no question of your jurisdiction over the San Francisco Bank, if there is a San Francisco Bank, or over the Los Angeles Bank, if there is such a bank, or over the Portland Bank, if there is one, because all of the assets, whichever of those one, two or three exist, were within the state of California and all of them are appearing here. We have served your process within the state of California. In some of the accounting, when you have decided and the appellate courts have ruled which banks exist, and whether Ammann had any authority, or what Long Beach is bound to do, there will have to be an accounting involving not \$75,000, but hundreds of times that. In that accounting you can then adjust whatever equities are necessary.

The Court: By surcharge?

Mr. Chapman: By surcharge, if necessary.

But at the moment you have somebody's assets to the tune of nearly \$14,000,000 here. Los Angeles says they were part of their seized assets. San Francisco says, no, they are ours. Long Beach says they are partly ours or all ours.

But you don't have to wait until you make the last item in that accounting in order to now make an allowance or an item. You can, however, say that this particular item that you are now allowing to the Los Angeles class plaintiffs— [890] and they are stockholders, 174 of those associations are stockholders in whichever bank or banks exist—and you can now say, I am going to allow you \$75,000 out of this money because some of it is going to belong to you as stockholders in whichever bank I find exists, and if it turns out that Long Beach is entitled to judgment against those banks, when I draw that final judgment I will adjust that item. You don't have to say that you are going to charge any of the \$75,000 against Long Beach in so far as Long Beach may be a stockholder.

The Court: That is what I intend to say.

Mr. Chapman: That is what you said on the bench.

The Court: In other words, I do not think that Long Beach should be charged with these fees because the benefit that is derived from them, if any ultimately is, will be derived not only on behalf of Long Beach, but on behalf of all of the shareholders of the Los Angeles Bank.

Mr. Chapman: I see no obstacle in your making

the order either in the form proposed by Mr. Works and Mr. Gilbert or the form proposed by us. We like our form because it seemed more emphatic in favor of the Long Beach Association never paying any part of it.

Mr. Works: Either form is all right as far as we are concerned.

The Court: It says: "It is a condition of this order [891] that no part of either of said sums shall be assessed ultimately against Long Beach Federal Association or its assets." What can be more definite than that?

Mr. Chapman: Our point is to make it a final judgment now rather than postpone it to ultimately. This would seem to me to postpone the question while our form decides now that it will never be against Long Beach and that whatever may later need to be done. In other words, you reserve power.

The Court: That no part shall be assessed ultimately.

Mr. Chapman: I appreciate that, but they go into the collateral question. My viewpoint of your Honor's order is that it reduces that note by \$75,000, whoever owns it and whoever owes anything on it. You now say that the amount of that note is down \$75,000. Therefore there should be no reference to any collateral.

The Court: Why cannot you add in here, "It is a condition of this order that no part of either of said sums now or shall at any time be assessed against Long Beach Federal Association"?

Mr. Works: Yes. You have a future provision in yours. You say "shall never be allocated," which carries it into the future also.

Mr. Chapman: Yes, that is right.

The Court: "* * * no part of said sums now or shall at any time be assessed"—strike out "ultimately"—"against [892] Long Beach Federal Association or its assets."

Mr. Chapman: I don't like that collateral provision. That might assume we might have some liability. They say, we shall not be required to furnish additional collateral for \$75,000. That was our principal objection.

The Court: I am deciding that now. The only cash here, dollars, is Long Beach's, is that not so?

Mr. Westover: That is right.

Mr. Chapman: That you haven't decided yet.

The Court: I mean produced by Long Beach.

Mr. Chapman: They came in through Long Beach's efforts in respect to the disputed claims, but you haven't decided whether Long Beach owns a dime of the assets in court.

The Court: All of the cash money has come from Long Beach, is that not right?

Mr. Chapman: I don't think that is correct. I think intervening borrowers have put in plenty of money, such as people paying off their notes.

The Court: But they would go to Long Beach.

Mr. Chapman: That depends on the assignments on the back of those notes which were cancelled and transferred. Some of those notes were assigned by Ammann, purporting to act for Long Beach, about \$6,000,000 or \$7,000,000 worth, to the San Fran-

cisco Bank, if there was any such bank, and the San Francisco Bank used seized Los Angeles assets [893] to pay Ammann as commission for those assignments. That is why I think any reference to additional collateral ever being required is improper. If the amount of the note is written down that much it could never require collateral to the amount that was cancelled thereby. If, after reading theirs, you had read ours again you would see our point more clearly than I have made it by argument here.

The Court: You say it is not assessed against any specific party or parties?

Mr. Chapman: Except that.

The Court: I know, except that. Why put that in? It is a condition that no part of either of said sums now or at any time be assessed against.

Mr. Chapman: Do you want to now determine who you are assessing it against?

The Court: No. All I want to determine is that Long Beach should not pay it.

Mr. Chapman: That is what we were trying to get at.

Mr. Angell: Who then, if Long Beach doesn't pay it, who is it a judgment against?

The Court: It is not a judgment against anybody, it is an order to the clerk to pay some money out of the registry of the court. It is a judgment against the funds that are deposit in court.

Mr. Angell: That is equivalent to a judgment against [894] the person who owns them.

The Court: Who owns it?

Mr. Chapman: We don't own that until the lawsuit is over.

Mr. Angell: I think who owns them is as clear as anything could be, that is, that Long Beach owns them. I never, never knew of any person who had anything put up for security that didn't own it. All the other fellow had was a security in it.

Mr. Chapman: If you are willing to stipulate that we don't owe you any money——

The Court: He means that you owe it but the property is yours.

Mr. Angell: If I give you my automobile as security for a note, I still own the automobile. All you have is a lien.

Mr. Works: I don't care which one of these you use. It makes no difference to me. The intention of everyone is clear, that Long Beach is to be saved harmless. It is just a question of how to say it.

Mr. Chapman: Ours tries to follow the previous orders about reservation of power, particularly the one that we worked four or five drawings to put in on May 10, 1949.

The Court: Here are some notions—you say you have no objection—take their suggestion down to line 15. It says: “It is ordered, adjudged and decreed”—say, “It is [895] hereby adjudged and ordered that neither said amounts nor any part thereof herein allowed and ordered paid”—strike out “from said funds”—“are now or shall ever be allocated against or imposed upon any part”—strike “of the same against or upon”—“upon any part of the funds or assets ultimately found to be owned by or belonging to Long Beach Federal Savings & Loan Association,” etc., to the end of the paragraph. And then adding: “Except as such association shall bear

as a shareholder only of either the San Francisco Bank or the Los Angeles Bank."

Mr. Chapman: Los Angeles or Portland. We don't know which banks are coming out of this.

The Court: There are only two here now, are there not?

Mr. Chapman: I don't know whether San Francisco is Portland or Portland is San Francisco.

Mr. Angell: All it is is a change of corporate name.

Mr. Works: Say "any of the home loan banks parties hereto," if you want to.

Mr. Chapman: That will be fine.

The Court: "as a shareholder only of any of the home loan banks parties hereto"——

Mr. Works: "any home loan bank party hereto." Either you are right or we are right.

The Court: "shareholder only of a home loan bank"—leave out "party hereto." [896]

Mr. Chapman: Yes.

Mr. Works: All right.

The Court: Then adding: "The intention being that the services for which fees are herein allowed are primarily for the benefit of said Los Angeles Bank and its association shareholders as distinguished from the Long Beach Association and other parties as separate entities or parties. To that end, it is further ordered that Long Beach Association shall not at any time be required to deposit any additional money or property in court upon or because of the payment of all or any portions of the sums required herein to be paid."

Mr. Chapman: That suits me.

Mr. Works: That is fine.

The Court: I will have to unscramble some of the language here.

Mr. Chapman: Maybe you would rather dictate it.

The Court: Do you want to have the girl come in and I will dictate it?

Mr. Angell: May the record show that our presence here at the drawing of this order does not waive any of our objections to the form of the order either as presented or as finally drawn. That is just made for record purposes, your Honor.

The Court: Surely.

And the same is true of the Government. [897]

Mr. Fitting: Thank you. [898]

* * *

[Endorsed]: No. 12591. United States Court of Appeals for the Ninth Circuit. John H. Fahey, et al., Appellants, vs. O'Melveny & Myers, W. I. Gilbert, Jr., and Richard FitzPatrick, Appellees, and Federal Home Loan Bank of San Francisco, Appellant, vs. O'Melveny & Myers, W. I. Gilbert, Jr., and Richard FitzPatrick, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed August 14, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

EXHIBIT "A"

PARTIAL TABLE OF DOCUMENTS PRINTED
IN RECORD ON APPEAL IN FAHEY, ET
AL., V. MALLONEE, ET AL., 12511, PER-
TINENT TO APPEAL 12591

Motion of Federal Home Loan Bank of Los
Angeles for Order Directing Payment of
Attorneys' Fees on Account Vol. XII, page 5698

Affidavit of Richard FitzPatrick in sup-
port thereof.....Vol. XII, page 5702

Notice of Motion for Leave to Serve Supple-
ment to Motion for Order Directing Pay-
ment of Attorneys' Fees, dated July 7,
1949Vol. XV, page 6942

Affidavit of Paul Fussell and John Whyte
.....Vol. XV, page 6944

Affidavit of Richard FitzPatrick Vol. XV,
..... page 6954

Affidavit of J. Francis Moore, dated Septem-
ber 21, 1949.....Vol. XV, page 7228

Affidavit of Ernest Reardon dated September
20, 1949, and Exhibits.....Vol. XV, page 7241

Motion and Petition of First Federal Savings
and Loan Association of Wilmington for
Allowance on Account of Attorneys' fees,
etc. Dated February 10, 1950..Vol. XIX,
..... page 8909

Affidavit of W. I. Gilbert, Jr., filed February 20, 1950.....	Vol. XIX, page 9022
Answer and Opposition of San Francisco Bank to Motion of First Federal Savings and Loan Association of Wilmington, dated February 23, 1950.....	Vol. XX, page 9192
Affidavit of Frank C. Noon, and Exhibits	Vol. XX, page 9201
Memorandum of Home Loan Bank Board, et al., in Opposition to Motions by Plaintiffs for Order Directing Payment of Attorneys' Fees on Account and Costs. Filed February 23, 1950.....	Vol. XX, page 9058
Response of Plaintiffs Mallonee, et al., to All Applications re Attorneys' Fees	Vol. XX, page 9080
Affidavit of Irving Bogardus in Opposition to Motion of Wilmington.....	Vol. XX, page 9206
Affidavit of Ammann in Opposition to Motion of Wilmington for Allowance of Fees, filed March 14, 1950.....	Vol. XX, page 9312
Affidavit of Tracy Skelton filed March 14, 1950.....	Vol. XX, page 9323
Affidavit of J. Howard Edgerton filed March 14, 1950.....	Vol. XX, page 9340
Motion for Order Requiring Deposit in Court and to Redeliver Excess Collateral, filed February 9, 1948.....	Vol. VIII, page 3562

Return of San Francisco Bank in Resistance
to Motion for Deposit, etc. Vol VIII, page 3690
Order dated March 26, 1948, Requiring
Deposit of Notes, Deeds of Trust, etc.
.....Vol. XVIII, page 8526
Motion of San Francisco Bank to Vacate and
Set Aside Order of Impound, filed July 30,
1948.....Vol. XI, page 4953

Respectfully Submitted,

ERNEST A. TOLIN,

U. S. Attorney, Southern
District of California.

By /s/ ARLENE MARTIN,

Assistant U. S. Attorney.

/s/ WILLIAM F. McKENNA,

Assistant General Counsel,
Home Loan Bank Board.

Attorneys for Appellants, Home Loan Bank Board,
William K. Divers, J. Alston Adams, O. K.
LaRoque, the Federal Savings and Loan In-
surance Corporation, John H. Fahey, A. V.
Ammann and George K. Bramley.

VERNE DUSENBERY,

PHILIP H. ANGELL,

BISHOP & HOFFMAN,

By /s/ PHILIP H. ANGELL,

Attorneys for Appellant, Federal Home Loan Bank
of San Francisco.

[Endorsed]: Filed December 1, 1950.

EXHIBIT "A"

PARTIAL TABLE OF DOCUMENTS PRINTED
IN RECORD ON APPEAL IN FAHEY, ET
AL., V. MALLONEE, ET AL., 12511, PER-
TINENT TO APPEAL 12591

Complaint to Enforce Legal and Equitable
Claims to, to Obtain Possession of and to
Remove Liens from and Clouds Upon Title
to, Property and for Other and General Re-
lief, and Exhibits.....Vol. XX, page 9466

Exhibit A—Federal Home Loan Bank of
Los Angeles Trial Balance, March 29,
1946.....Vol. XX, page 9497

Exhibit B—Federal Home Loan Bank of
Los Angeles Administration Bulletin
54.....Vol. XX, page 9498

Affidavit of Berry, C. E., for Order Directing
Service of Process Outside the District or
for Publication Thereof....Vol. XX, page 9503

Order Directing Service of Process Outside
the District, or for Publication Thereof
.....Vol. XX, page 9502

Summons to Federal Home Loan Bank of
Portland and Return of Service
.....Vol. XX, page 9506

Summons to Fahey, John H., etc., and Return
of Service.....Vol. XX, pages 9508, 9511

Cross-Claim of Federal Home Loan Bank of Los Angeles to Enforce Legal and Equitable Claims to, to Obtain Possession of, and to Remove Liens From and Clouds Upon Title to, Property and for other and General Relief.....	Vol. II, page	564
Order Directing Service of Process of Cross-Claim of Federal Home Loan Bank of Los Angeles Outside of the District or for Publication Thereof.....	Vol. II, page	595
Summons on Cross-Claim of Federal Home Loan Bank of Los Angeles to the Federal Home Loan Bank of Portland With Return of Service.....	Vol. II, page	606
Summons on Cross-Claim of Federal Home Loan Bank of Los Angeles to John H. Fahey, etc., with Returns of Service	Vol. II, pages 801,	802
Answer of Home Loan Bank Board, et al.,	Vol. XX, page	9540
Answer of Federal Home Loan Bank of San Francisco to Cross-Claim of Federal Home Loan Bank of Los Angeles, and Exhibits	Vol. IX, page	4103
Answer of Home Loan Bank Board, et al., to Third Party Cross-Claim of Federal Home Loan Bank of Los Angeles..	Vol. XI, page	5067
Minute Order Entered November 3, 1947	Vol. XX, page	9531

Return of Federal Home Loan Bank of Los Angeles to Order to Show Cause	Vol. VIII, page 3642
Order for Substitution of Parties-Defendant Under Rule 25(d) F.R.C.P..	Vol. XX, page 9532
Order for Substitution of Parties Cross-Defendant Under Rule 25(d) F.R.C.P. Filed July 6, 1948.....	Vol. X, page 4547
Affidavit of Publication of Order Setting for Hearing Motion of Plaintiffs for Order Directing Payment of Attorneys' Fees on Account, etc.....	Vol. XIX, pages 8862, 8877, 8957
Order Setting for Hearing Motions of Plaintiffs for Order Directing Payment of Attorneys' Fees, etc.....	Vol. XX, page 9547
Exhibit A—Names and Addresses of Members and Stockholders of Banks	Vol. XX, page 9551
Notice of Continuance of Hearing on Motion and Petition of Plaintiffs for an Order Directing Payment of Attorneys' Fees, etc.	Vol. XX, page 9356
Affidavit of Service.....	Vol. XX, page 9357
Notice of Continuance of Hearing on Application for Fees.....	Vol. XX, page 9413
Affidavit of Service.....	Vol. XX, page 9414
Minute Order Entries:	
February 28, 1950.....	Vol. XX, page 9271
March 22, 1950.....	Vol. XX, page 9404

Reporter's Transcript of Conferences

.....Vol. XXIII, pages 10709, 10738, 10743

Reporter's Transcript of Proceedings

.....Vol. XXIII, page 10403

.....Vol. XXIV, page 11453

Respectfully submitted,

RICHARD FITZPATRICK,

O'MELVENY & MYERS,

By,

Pierce Works.

Attorneys for Appellees Federal Home Loan Bank
of Los Angeles, et al.

[Endorsed]: Filed January 18, 1951.

In the United States Court of Appeals
For the Ninth Circuit

No. 12591

JOHN H. FAHEY, et al.,

Appellants,

vs.

O'MELVENY & MYERS, et al.,

Appellees.

FEDERAL HOME LOAN BANK OF SAN
FRANCISCO,

Appellants,

vs.

O'MELVENY & MYERS, et al.,

Appellees.

STATEMENT OF FEDERAL HOME LOAN
BANK OF SAN FRANCISCO OF POINTS
TO BE RELIED UPON ON THIS APPEAL

In accordance with Rule 19(6) of the Rules of this Court, appellant Federal Home Loan Bank of San Francisco makes this statement of points to be relied upon on this appeal.

I. The District Court lacks jurisdiction of the consolidated actions in which the order appealed from was entered, and therefore was without power to enter said order awarding attorneys' fees and directing the payment thereof, and its findings of fact and conclusions of law to the contrary are erroneous.

II. The District Court lacked jurisdiction in Federal Home Loan Bank of Los Angeles, et al., v. Federal Home Loan Bank of San Francisco (No. 5678-W.M. below), one of said consolidated actions, in that.

A. The members of the Home Loan Bank Board are indispensable parties to said action.

B. The said Board members have not been and cannot be duly sued or served in said action.

1. The said Board members are non-residents of the State of California and have never been served therein.

2. The said Board members may not be sued or served as non-resident defendants in said action under 28 USC 1655 since said action is not one to enforce a lien or remove a cloud on property located within the State of California, and the relief prayed for cannot be granted save by a decree in personam against the Board members, which is unauthorized by 28 USC 1655.

3. The said Board members have never made a general appearance in said action or otherwise submitted to the jurisdiction of the District Court over their persons. The District Court's findings and conclusions of law to the contrary are erroneous.

C. Neither the Federal Home Loan Bank of Los Angeles nor its shareholders have any justiciable interest sufficient to maintain said action.

D. The said action is an unconsented suit against the United States.

E. The Administrative Procedure Act does not confer jurisdiction upon the District Court and the court's findings and conclusions of law to the contrary are erroneous.

III. The District Court lacked jurisdiction in *Mallonee, et al., v. Fahel, et al.* (No. 5421-PH below), the second of said consolidated actions, in that,

A. The claims in said second action are inseparable from those alleged in the other consolidated action.

B. The second action involves a collateral attack on the administrative orders complained of in said action.

C. The matters involved in said administrative orders are within the exclusive, primary jurisdiction of the Home Loan Bank Board, and the parties allegedly aggrieved by said orders have failed to exhaust their administrative remedies.

D. The District Court lacked jurisdiction over the persons of the present and former members of the Home Loan Bank Board in said second action, and said Board members are indispensable parties to said action.

1. None of said present or former members are residents of the State of California, and none have been served therein.

2. The said present and former members cannot be sued or served in said second action as non-resi-

dent defendants under Title 28 USC 1655. The District Court's findings and conclusions of law to the contrary are erroneous.

(a) The said second action was never one to enforce or remove a lien or cloud on property located within the State of California.

(b) Upon the termination of the appointment of defendant Ammann as Conservator of the Long Beach Federal Savings and Loan Association, the said action had for its sole object an in personam judgment for money damages which is unauthorized by 28 USC 1655.

3. The said present and former members cannot be sued or served under 28 USC 1335 or 2361, either in said second action or in the so-called cross-claims or interpleaders or bills in the nature of interpleader filed in said action. The District Court's findings and conclusions of law to the contrary are erroneous.

(a) The said actions, cross-claims, interpleaders, or bills in the nature of interpleader, are none of them civil actions of or in the nature of interpleader.

(b) None of said present or former members are "claimants" to any of the money or property in controversy, within the meaning of 28 USC 1335 and 2361.

(c) The claims, if any, of said present and former members, are asserted in their official capacity only, and are thus the claims of the United States which has not consented to be sued thereon.

4. None of said present or former members has ever made a general appearance or otherwise submitted to the jurisdiction of the District Court over his person in said second action or other proceeding filed therein. The District Court's findings and conclusions of law to the contrary are erroneous.

5. The claims for damages now contained in said second action are all predicated upon the alleged invalidity of the administrative order appointing a conservator, and the present and former members of the Home Loan Bank Board are necessary and indispensable parties to the determination of such issue.

E. The said second action is an unconsented suit against the United States.

F. The District Court lacked jurisdiction over the Federal Savings and Loan Insurance Corporation.

1. Said corporation has never been served in the State of California.

2. Said corporation cannot be sued or served in the State of California, since it is not a California corporation, and neither does business in the State of California nor maintains any agent on whom service can be made in said state.

3. Said corporation cannot be sued or served as a non-resident defendant under 28 USC 1655 or 1335 and 2361 for the reasons specified in Points III-D-2 and 3 above.

G. The Administrative Procedure Act does not confer jurisdiction upon the District Court and the court's findings and conclusions of law to the contrary are erroneous.

IV. Assuming, contrary to fact and law, that the District Court had jurisdiction of one or more of the consolidated actions for some purpose, the District Court erred in awarding attorneys' fees to appellees.

A. The District Court is without power to award fees to counsel for plaintiffs against defendants in Action No. 5678.

1. Said action is one in personam for recovery of property alleged to have belonged to a Federal corporation and instrumentality which has been dissolved.

2. In such action the District Court is without power to award, in the absence of authorization by statute or contract, attorneys' fees in favor of one litigant against another.

3. There is no general fund subject to the jurisdiction of the District Court which has been benefited by the services of appellees and against which an award of attorneys' fees can be made under the District Court's general equity power.

B. There are no funds or assets of Los Angeles Bank (one of the plaintiffs in said Action No. 5678) on deposit or subject to the jurisdiction of the District Court as against which an allowance of fees can be made on the theory of receivership or

derivative class action, and there is no sufficient justification for any such award under the circumstances of this case.

1. Action No. 5678 is not a receivership case in which an allowance for fees and expenses incurred in resisting an application for receivership may be allowed as against a receiver.

2. The legal existence of the purported Los Angeles Bank and its right to maintain the action is one of the principal issues of said action, which is untried and undetermined.

3. The right of shareholders to reimbursement for fees and expenses incurred in a derivative class action exists only as against the funds of the corporation in whose behalf the action is brought.

4. The asserted claim of the Los Angeles Bank to certain property of the San Francisco Bank on deposit in court or otherwise is one of the principal issues of said action and is untried and undetermined.

5. The District Court's findings and conclusions of law to the effect that the services of appellees were necessarily rendered in good faith and benefited plaintiffs are unsupported by the evidence and are contrary to law; and even if such findings were properly established, they would not constitute legal justification for the award of attorneys' fees from which this appeal is taken.

C. The District Court's award of attorneys' fees to appellees at this time is premature.

1. Prior to judgment following a trial on the merits, there is no general or other fund subject to the control of the District Court against which any such award could properly be made for the reasons set forth in A-3 and B-4 above.

2. The right to reimbursement for fees and expenses incurred in a derivative class action arises only when the action results in a pecuniary benefit to the corporation, which can be determined only upon a final termination of the litigation, and an application for allowance of fees prior thereto is premature.

V. Assuming, contrary to fact and law, that the District Court had jurisdiction of one or more of the consolidated actions for some purpose and could award fees to appellees at this time, the District Court erred in ordering payment of such fees out of moneys on deposit in the registry of the court.

A. Moneys on deposit in the registry of the court have accrued from various interventions, interpleaders or proceedings in the nature of interpleader, all of which are ancillary to Action No. 5421, while attorneys' fees allowed by the District Court were awarded to attorneys for plaintiffs in case No. 5678 and did not accrue in connection with any of said ancillary proceedings.

B. There are no general funds in the registry of the court available for the payment of such allowance.

C. The failure of the District Court's order for

allowance to designate particularly which of several specific funds are to be used for the payment of said fees and the conditions attached to such order render it incapable of being carried out, except as against collateral securing obligations owned by this appellant, payment from which would constitute a premature, prejudicial and unlawful deprivation of property of this appellant without due process of law to its irreparable injury.

Dated: August 21, 1950.

Respectfully submitted,

VERNE DUSENBERY,
PHILIP H. ANGELL,
IRVING G. BISHOP,
SYLVESTER HOFFMAN,

By /s/ PHILIP H. ANGELL,

Attorneys for Appellant Federal Home Loan Bank
of San Francisco.

[Endorsed]: Filed August 21, 1950.

[Title of Court of Appeals and Cause.]

JOINDER OF APPELLANTS HOME LOAN
BANK BOARD, ET AL., IN STATEMENT
OF FEDERAL HOME LOAN BANK OF
SAN FRANCISCO OF POINTS TO BE RE-
LIED UPON ON THIS APPEAL

The appellants Home Loan Bank Board, an
agency of the executive branch of the Government
of the United States, William K. Divers, Chairman,

and J. Alston Adams and O. K. LaRoque, Members of the Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, a corporate instrumentality of the United States, wholly owned by the United States; John H. Fahey, A. V. Ammann, and George K. Bramley hereby join in the "Statement of Federal Home Loan Bank of San Francisco of Points to Be Relied Upon on This Appeal," filed in this Court on August 21, 1950, and adopt such statement as the Statement of Points of these appellants to be Relied Upon on This Appeal.

Dated: September 5, 1950.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING, and

PAUL FITTING,
Assistant United States Attorneys.

By /s/ PAUL FITTING,
Attorneys for Appellants. Home Loan Bank Board,
Wm. K. Divers, J. Alston Adams, O. K. LaRoque, Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann and George K. Bramley.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 8, 1950.

[Title of Court of Appeals and Cause.]

ORDER PERMITTING REFERENCE TO
PRINTED RECORD ON APPEAL IN AP-
PEAL ENTITLED "FAHEY, ET AL., VS.
MALLONEE, ET AL." No. 12511 IN THE
FILES OF THE ABOVE-ENTITLED
COURT, EXTENDING TIME OF ALL PAR-
TIES FOR DESIGNATION OF PORTIONS
OF RECORD FOR PRINTING ON AP-
PEAL, AND EXTENDING TIME OF ALL
PARTIES FOR FILING BRIEFS

Good Cause Appearing Therefor and pursuant to the written stipulation of appellants and appellees in the above-entitled appeal, it is hereby ordered that:

Reference may be made in the above-entitled appeal to the printed record on appeal in Fahey, et al., vs. Mallonee, et al., No. 12511 in the files of the above-entitled Court and that it will not be necessary for any of the parties to this appeal to reprint in the above-entitled appeal any portions of the record printed in said appeal No. 12511;

Appellants shall have fifteen (15) days from and after the mailing by the clerk of the above-entitled Court of the printed record in said appeal No. 12511 within which to designate portions of the record to be printed in the above-entitled appeal, and appellees shall have fifteen (15) days after receipt of such designation by appellants within which to counter-designate any additional portions of the record to be printed;

The time for filing appellants' opening briefs in the above-entitled appeal shall be calculated from the date upon which copies of the printed record in the above-entitled appeal are mailed by the clerk of said Court of Appeals.

Dated: September 18, 1950.

/s/ CLIFTON MATHEWS,

/s/ HOMER T. BONE,

/s/ WALTER L. POPE,

Judges of the United States Court of Appeals for
the Ninth Circuit.

[Endorsed]: Filed September 19, 1950.

No. 12591
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FAHEY, *et al.*,

Appellants (Defendants),
vs. (5421-PH)

MALLONEE, *et al.*,

Appellees (Plaintiffs).

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,
Appellants (Defendants),
vs. (5678-PH)

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,
Appellees (Plaintiffs).

Plaintiffs' Opposition to Stay of Payment of Attorneys' Fees and Points and Authorities in Support Thereof.

WESTOVER & SMITH,
1007 Pacific Southwest Building, Los Angeles 14,
Attorney for Appellees Mallonee, et al., Plaintiffs, Below, Shareholder's Protective Committee for 16,000 Shareholders of the Long Beach Federal Savings and Loan Association.

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FILED

TOPICAL INDEX.

	PAGE
Plaintiffs' opposition to stay of payment of attorneys' fees.....	1
Description of the litigation.....	1
Explanation of designation of parties.....	4
The purpose	7
The issues	9
Pleadings	13
The facts	19
Stay should be denied.....	44
Points and authorities.....	45
A. Jurisdiction. The said U. S. District Court had, and still has, jurisdiction of the persons and subject matter involved in Consolidated Cases Nos. 5421-P.H. and 5678-P.H.	45
B. The District Court at Los Angeles, within whose district the assets were seized, and are yet situated, has jurisdiction to determine ownership and possession of such assets	51
C. When two or more tribunals may each take jurisdiction of an action, the tribunal wherein jurisdiction first attaches holds it to the exclusion of all others until its duty is fully performed and the jurisdiction involved is exhausted	57
D. Justice delayed is justice denied.....	62
The actions here involved seek injunctions, among other things	64
Where the judgment is self-executing and does not require a writ of execution, its effect can only be suspended by an affirmative order either of the court which makes the decree or of the appellate tribunal.....	68

Exhibit "A." Findings of fact, conclusions of law and order for interim partial allowance on account of expenses and attorneys' fees incurred by the plaintiffs, the Shareholders Protective Committee, prior to March, 1947. Submitted pursuant to direction in the opinion of the court announced April 7, 1947. [U. S. District Court, Civil File No. 5421-P.H.].....	78
Exhibit "B." Order denying application for stay of execution of order allowing attorneys' fees and expenses. [U. S. District Court, Civil File No. 5421-P.H.].....	90
Exhibit "B" of Exhibit "B." Order denying application for review by three judge court pursuant to Title 28, Section 792, U. S. C. A. [U. S. District Court, Civil File No. 5421-P.H.]	100

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Alabama v. United States, 279 U. S. 229, 73 L. Ed. 675.....	75
Carter v. American Insurance Co., 3 Peters 307.....	62
Clarke v. Hot Springs Electric Light & Power Co., 65 F. 2d 612; cert. den., 287 U. S. 619, 77 L. Ed. 537.....	62
Commonwealth Trust Co. v. Reconstruction Finance Corp., 28 Fed. Supp. 586.....	54
Conrad v. West, 98 A. C. A. 125, 219 P. 2d 477.....	57, 58
Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. Ed. 537	56
Covell v. Heymann, 111 U. S. 176.....	57, 58
Cowdry v. Galveston, 93 U. S. 352.....	62
Cramer v. Phoenix Mutual Life Ins. Co., 91 F. 2d 141; cert. den., 301 U. S. 685.....	59
Cumberland Telephone and Telegraph Co. v. Louisiana Public Service Commission, 67 L. Ed. 217, 260 U. S. 212.....	73
Dickinson v. Petroleum Conversion Corporation, 94 L. Ed. 280..	63
Dillon v. Superior Court, 98 A. C. A. 654.....	60
Dugas v. American Surety Co., 82 F. 2d 953; affd., 300 U. S. 414, 81 L. Ed. 720, 57 S. Ct. 515.....	59
Eagle Star & British Dominion v. Tablack, 15 Fed. Supp. 933....	59
Eggerts v. Pacific States Savings and Loan Co., 53 Cal. App. 2d 554	62
Goddard v. Ordway, 94 U. S. 672.....	65, 67
Holbrook Irrigation Dist. v. Arkansas Valley Land Co., 54 F. 2d 840	60
Hovey v. McDonald, 109 U. S. 152, 27 L. Ed. 888.....	69
Hynes v. Grimes Packing Co., 237 U. S. 86, 93 L. Ed. 1231....	60
Land v. Dollar, 330 U. S. 731.....	60
Magnum Import Company v. Coty, 262 U. S. 159, 67 L. Ed. 922	73
McCourt v. Singers-Bigger, 150 Fed. 102.....	65, 66, 67

Exhibit "A." Findings of fact, conclusions of law and order for interim partial allowance on account of expenses and attorneys' fees incurred by the plaintiffs, the Shareholders Protective Committee, prior to March, 1947. Submitted pursuant to direction in the opinion of the court announced April 7, 1947. [U. S. District Court, Civil File No. 5421-P.H.].....	78
Exhibit "B." Order denying application for stay of execution of order allowing attorneys' fees and expenses. [U. S. District Court, Civil File No. 5421-P.H.].....	90
Exhibit "B" of Exhibit "B." Order denying application for review by three judge court pursuant to Title 28, Section 792, U. S. C. A. [U. S. District Court, Civil File No. 5421-P.H.]	100

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Alabama v. United States, 279 U. S. 229, 73 L. Ed. 675.....	75
Carter v. American Insurance Co., 3 Peters 307.....	62
Clarke v. Hot Springs Electric Light & Power Co., 65 F. 2d 612; cert. den., 287 U. S. 619, 77 L. Ed. 537.....	62
Commonwealth Trust Co. v. Reconstruction Finance Corp., 28 Fed. Supp. 586.....	54
Conrad v. West, 98 A. C. A. 125, 219 P. 2d 477.....	57, 58
Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. Ed. 537	56
Covell v. Heymann, 111 U. S. 176.....	57, 58
Cowdry v. Galveston, 93 U. S. 352.....	62
Cramer v. Phoenix Mutual Life Ins. Co., 91 F. 2d 141; cert. den., 301 U. S. 685.....	59
Cumberland Telephone and Telegraph Co. v. Louisiana Public Service Commission, 67 L. Ed. 217, 260 U. S. 212.....	73
Dickinson v. Petroleum Conversion Corporation, 94 L. Ed. 280..	63
Dillon v. Superior Court, 98 A. C. A. 654.....	60
Dugas v. American Surety Co., 82 F. 2d 953; affd., 300 U. S. 414, 81 L. Ed. 720, 57 S. Ct. 515.....	59
Eagle Star & British Dominion v. Tablack, 15 Fed. Supp. 933....	59
Eggerts v. Pacific States Savings and Loan Co., 53 Cal. App. 2d 554	62
Goddard v. Ordway, 94 U. S. 672.....	65, 67
Holbrook Irrigation Dist. v. Arkansas Valley Land Co., 54 F. 2d 840	60
Hovey v. McDonald, 109 U. S. 152, 27 L. Ed. 888.....	69
Hynes v. Grimes Packing Co., 237 U. S. 86, 93 L. Ed. 1231....	60
Land v. Dollar, 330 U. S. 731.....	60
Magnum Import Company v. Coty, 262 U. S. 159, 67 L. Ed. 922	73
McCourt v. Singers-Bigger, 150 Fed. 102.....	65, 66, 67

	PAGE
New York Dock Co. v. Poznon, 274 U. S. 117.....	62
Omaha National Bank of Omaha v. Federal Reserve Bank of Kansas City, Missouri, 26 F. 2d 884.....	54
Pennsylvania Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850..	59
Peoples Bank of Belleville v. Winslow in re Calhoun Inter- pleader, 102 U. S. 101 (Charles Otto 256, 1880).....	60
Philadelphia Company v. Stimson, 223 U. S. 604, 56 L. Ed. 570	61
Ponzi v. Fessenden, 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607	58
Railway Express v. Jones, 106 F. 2d 341.....	55
Rice Railway Corporations v. Lathrop, 278 U. S. 509.....	75
Rickey Land and Cattle Company v. Miller and Lux, 218 U. S. 258	59
Ruby Lee Minar Ins. v. Hammett, 53 F. 2d 149.....	62
Spier Aircraft Corporation, In re, 137 F. 2d 736.....	68
Sprague v. Ticonic Bank, 307 U. S. 161.....	62
Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356, 65 L. Ed. 673	61
Treinies v. Sunshine Mining Co., 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85.....	59
Trustees v. Greenough, 105 U. S. 527.....	62
United States v. Lee, 106 U. S. 196.....	61
United States v. Union Pacific and Western Union Telegraph, 160 U. S. 3, 40 L. Ed. 319.....	56
Virginian Railway v. United States, 272 U. S. 658.....	75
Warren v. Palmer, 310 U. S. 132.....	62
Williams v. Fanning, 332 U. S. 490, 91 L. Ed. 95.....	60
Winslow v. Ferguson, 25 Cal. 2d 274.....	62

v.

STATUTES	PAGE
Executive Order No. 9070, Feb. 24, 1942.....	46
Federal Rules of Civil Procedure, Rule 22.....	46, 51
Federal Rules of Civil Procedure, Rule 62, Subd. (a).....	64, 66
Federal Rules of Civil Procedure, Rule 62, Subd. (e).....	68
Federal Rules of Civil Procedure, Rule 62, Subd. (g).....	64
Federal Rules of Civil Procedure, Rule 73, Subd. (d).....	63
Federal Rules of Civil Procedure, Rule 73, Subd. (e).....	63
Home Owners Loan Act of 1933 (48 Stat. 128; 12 U. S. C. 1461)	46
Home Owners Loan Act of 1933, Sec. 5(d).....	47
Reorganization Act of 1945 (59 Stat. 613; 5 U. S. C. 133y)....	46
The Federal Home Loan Bank Act, (47 Stat. 725; 12 U. S. C. 1421, 15 U. S. C. 602).....	46
The First War Powers Act of 1941 (55 Stat. 838; 50 U. S. C. App. 601)	46
The National Housing Act (48 Stat. 1246; 12 U. S. C. 1724)....	46
United States Code, Title 28, Sec. 41, Subd. 26.....	46, 51
United States Code, Title 28, Sec. 118.....	46, 51
United States Code, Title 28, Sec. 1335.....	46, 51
United States Code, Title 28, Sec. 1397.....	46, 51
United States Code, Title 28, Sec. 2361.....	46, 51
United States Code, Title 28, Sec. 1655.....	46, 51
United States Code Annotated, Sec. 1009, Subd. (a).....	52
United States Code Annotated, Sec. 1009, Subd. (b).....	52

No. 12591

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FAHEY, *et al.*,

Appellants (Defendants),

vs. (5421-PH)

MALLONEE, *et al.*,

Appellees (Plaintiffs).

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants (Defendants),

vs. (5678-PH)

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees (Plaintiffs).

PLAINTIFFS' OPPOSITION TO STAY OF PAY- MENT OF ATTORNEYS' FEES.

Filed by:

1. The Plaintiffs, and
 2. The Cross-claimants Long Beach Federal Savings and Loan Association, Opposing Defendants' Motions for Stay.
-

Description of the Litigation.

This litigation has thus far involved fourteen (14) proceedings in state and federal, trial and appellate courts. Such proceedings are:

In the United States District Court, Southern District of California.

- (1) No. 5421-P.H., commenced May 27th, 1946.
- (2) No. 5678-P.H., commenced August 22nd, 1946.
- (3) No. 7989-P.H., commenced February 17th, 1948.

In the United States District Court, Northern District of California.

- (4) No. 28203-G, commenced July 22nd, 1948.

In the Superior Court of the State of California in and for the County of Los Angeles.

- (5) No. L.B.-C. 14492, commenced January 16th, 1948.

All of the foregoing are either consolidated into, or enjoined by, the main actions Nos. 5421-P.H. and 5678-P.H., in the Southern District Court.

In the United States Supreme Court.

- (6) *Fahey, et al., v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, decided June 23, 1947.

(7) *Ex Parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, (a writ of prohibition, mandamus and/or injunction against United States District Judge Peirson M. Hall, denied in June, 1947).

In the United States Court of Appeals for the Ninth Circuit.

- (8) *Ammann, et al. v. Mallonee, et al.*, No. 11751, dismissed February 6, 1948.

(9) *Fahey, et al. v. Mallonee, et al.*, No. 11867, dismissed February 25, 1948.

(10) Fahey, *et al.* v. Mallonee, *et al.*, No. 12511, presently pending appeal from preliminary injunction. Appeal taken December, 1949; record on appeal now in process of being printed.

(11) Petition by Fahey, *et al.*, for writ of prohibition, mandamus or other appropriate writ, v. United States District Judge Peirson M. Hall. Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

(12) Petition by Federal Home Loan Bank of San Francisco, *et al.*, for writ of prohibition, mandamus or other appropriate writ v. United States District Judge Peirson M. Hall. Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

(13) Fahey, *et al.* v. Ronald Walker, Special Master of the United States District Court, No. 12575, presently pending appeal from order allowing fees to Special Master, taken May 3-5, 1950.

(14) Fahey, *et al.* v. O'Melveny & Myers, *et al.*, No. 12591, presently pending appeal from order allowing attorneys' fees, taken June 20, 1950.

Exhibit 11-7-49-1, pages 14537 to 14544 of clerk's transcript, photographs of the run, depict events at the start of the litigation.

Exhibit A, page 13 of "Opposition to Appellants' Motion for Order to Disregard Designation by Appellees of Additional Portions of Record on Appeal, and Directing Transmittal of Record, Etc." filed March 28, 1950, before this Honorable Court of Appeals in the appeal No. 12511,

presently pending, is a photograph of part of the files found by the trial court, in single copies, to weigh in excess of 150 pounds as of March, 1949.

The clerk's pagination of the records transmitted to the Court of Appeals includes 19,142 typed pages, EXCLUSIVE OF REPORTER'S TRANSCRIPTS.

Explanation of Designation of Parties.

Because of the long and complicated names and the great number of parties involved in this litigation, these respondents will, for the purpose of brevity, refer to some of the various parties as follows:

United States District Court for the Southern District of California, Central Division, will hereinafter be referred to as DISTRICT COURT. (Honorable Peirson M. Hall, United States District Judge, has been a respondent before the United States Supreme Court and before the Court of Appeals for the Ninth Circuit on applications for writs of prohibition, etc., all of which have been denied.)

The original plaintiffs in the first action filed in the District Court by the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, Mallonee, *et al.*, on behalf of 16,000 depositors, will hereinafter be referred to as the PLAINTIFFS.

The third-party plaintiff and cross-claimant Long Beach Federal Savings and Loan Association (whose \$26,000,000 in assets were seized by certain of appellants-defendants, and returned by order of the United States District

Court), will hereinafter be referred to as the ASSOCIATION. (When necessary to distinguish from any other associations, it will be referred to as Long Beach Association.)

The defendant and cross-claimant in interpleader, Title Service Company (trustee on approximately \$12,000,000 of deeds of trust seized by appellants-defendants), will hereinafter be referred to as TITLE SERVICE.

The third-party defendant and cross-claimant in Action No. 5421-P.H. and plaintiffs in Action No. 5678-P.H., Federal Home Loan Bank of Los Angeles (whose \$46,000,000 in assets were seized by, and are yet held by, appellants-defendants) will hereinafter be referred to as the LOS ANGELES BANK.

The six Association Plaintiffs in Action No. 5678-P.H., suing on behalf of approximately 172 building and loan and savings and loan associations, stockholders in the seized Los Angeles Bank, will hereinafter be referred to as WILMINGTON ASSOCIATION, COAST ASSOCIATION, etc.

The defendants-appellants Federal Home Loan Bank of San Francisco, purportedly created by the instantaneous merger, liquidation and dissolution of the Federal Home Loan Banks of Los Angeles and Portland, will hereinafter be referred to as SAN FRANCISCO BANK. The defendant Federal Home Loan Bank of Portland will hereinafter be referred to as PORTLAND BANK.

The appellants-defendant Home Loan Bank Board, the present members thereof William K. Divers,

Chairman, J. Alston Adams, member, and O. K. LaRoque, member; the Federal Savings and Loan Insurance Corporation, its trustees who are said defendants Divers, Adams, and LaRoque, said defendants Divers, etc., all individually and in all other capacities; defendant A. V. Ammann as purported conservator, individually, and in every other capacity; defendant George K. Bramley as purported deputy conservator, individually and in every other capacity; John H. Fahey, individually, as Commissioner of former Federal Home Loan Bank Board, and in all official capacities, will all hereinafter be referred to as HOME LOAN BANK BOARD, ET AL., and/or FAHEY, ET AL., and/or AMMANN, ET AL.

If reference is made to the approximately fifty borrowers who have intervened in the action to clear the titles to more than 400 homes, they will be described simply as the INTERVENORS.

The numerous other parties to the litigation will be referred to less frequently and can best be described in the place they are referred to.

COMES NOW THE RESPONDENTS-APPELLEES, Plaintiffs SHAREHOLDER MEMBERS PROTECTIVE COMMITTEE (in No. 5421-P.H. Below) and the Cross-claimant, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, and in opposition to the Motions "For Stay of Payment from the Registry of the District Court of Attorneys' Fees Awarded by Order of the District Court of June 19, 1950" to the Attorneys for the Appellees FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*, and the FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WILMINGTON (both Plaintiffs in Consolidated Case No. 5678-P.H. Below), WHICH Motions were filed by the Appellants (Defendants in Consolidated Cases No. 5421-P.H. and 5678-P.H. Below), John H. Fahey, A. V. Ammann, George K. Bramley, Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank of San Francisco, who are presently withholding the assets of the Federal Home LOAN Banks of Los Angeles and Portland, MAKE THIS SAID APPELLEES' REPLY:

The Purpose.

These Motions by the Appellants are the THIRD ATTEMPT by the Appellants to delay and to prevent counsel for Plaintiffs below from receiving any attorneys' fees for services necessarily being rendered on behalf of the classes of stockholder-shareholder members represented by the Plaintiffs in both of the consolidated class actions No. 5421-P.H. and 5678-P.H. below, brought to recover possession of all of their assets aggregating in excess of \$70,000,000.00, wrongfully seized from the Appellees, Long Beach Federal Savings and Loan Association and Federal Home Loan Bank of Los Angeles. Appellant the Federal Home Loan Bank of San Francisco, is using part

of such seized assets to pay its own attorneys' fees and costs to resist the return of such wrongfully seized assets.

1. IN THE FIRST ATTEMPT (1947), the Supreme Court of the United States denied these same Appellants, John H. Fahey, the Federal Home Loan Bank Commissioner (Now Board), and A. V. Ammann, leave to file a Petition for a Writ of "Mandamus and/or prohibition and/or injunction" against Judge Peirson M. Hall of the United States District Court for the Southern District of California to stay and prevent the signing and execution of his Order allowing fees on account to counsel for these responding Appellees, the Plaintiffs (in No. 5421-P.H. Below) Shareholder Member Protective Committee, and to:

" . . . prohibit any further allowance therein, and to enjoin any payments heretofore allowed."

Mr. Justice Jackson, in denying these same Appellants' Petition therein, stated:

"An allowance of \$50,000 will hardly destroy a twenty-six million dollar association during the time it would take to prosecute an appeal."

(*Ex Parte Fahey, et al.*, 332 U. S. 258, 91 L. Ed. 2041 (June 23, 1947).)

2. IN THE SECOND ATTEMPT, this Honorable United States Circuit Court of Appeals for the Ninth Circuit, denied this same Appellant's, A. V. Ammann's Motion and Application for Stay of Execution, pending appeal "From an Order dated September 2, 1947 of the District Court for the Southern District of California, allowing an interim partial allowance to counsel for the Plaintiffs (in No. 5421-P.H. Below), Mallonee, *et al.*, the Shareholder

Members Protective Committee) on account of expenses and attorneys' fees."

(*Ammann v. Mallonee, et al.*, No. 11751, U. S. Circuit Court of Appeals for the Ninth Circuit; Stay Denied December 5, 1947; Appeal dismissed February 5, 1948.)

3. IN THIS THIRD ATTEMPT, the law of the case, as previously established by the United States Supreme Court and this Honorable United States Circuit Court of Appeals, should be followed and the stay denied.

The Issues.

The Appellants again seek to raise the same already decided issues, as follows:

I. That the allowance on account of attorneys' fees to the Plaintiffs, claimants to funds which are interpled and are now on deposit in the Registry of said U. S. District Court, is beyond the power of said Court.

Said assets amounting to \$14,000,000.00 were by final order of said District Court interpled into its Registry by various parties to the litigation, including appellants. Said interpled assets include funds and assets seized from Appellees Federal Home Loan Bank of Los Angeles and Long Beach Federal Savings and Loan Association by the Appellants-Defendants Ammann and Federal Home Loan Bank of San Francisco, aka the Federal Home Loan Bank of Portland, on March 29, 1946.

The assets on deposit in the Registry of said U. S. District Court at Los Angeles consist of approximately:

(a) \$5,300,000.00 in face value of United States Government Bonds, plus attached uncashed interest coupons representing several hundred thousands of dollars in accrued interest thereon.

(b) Approximately \$6,300,000.00 face amount of four notes executed by Defendant Ammann, an Appellant here, in favor of Federal Home Loan Bank of San Francisco, another Appellant here, who claims the Appellee Long Beach Federal Savings and Loan Association is liable therefor.

(c) Cash interpled by various parties, presently amounting to approximately \$1,387,640.45 as of August 10, 1950.

A total of assets on deposit in the Registry of the U. S. District Court amounting to approximately \$14,000,000.00.

II. Notwithstanding said \$14,000,000.00, Appellants claim that there is no general funds in the Registry of the Court from which the Court can order said attorneys' fees paid.

III. Notwithstanding the previous decisions of the U. S. Supreme Court and of this U. S. Court of Appeals, Appellants claim they are entitled to a Stay as a matter of right pending appeal, under Rules 62(d) and 73(d), F. R. C. P.

This, in spite of the specific exception provided by Rule 62(a) that:

“ . . . Unless otherwise ordered by the court an interlocutory or final judgment in an action for an injunction shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal.”

THESE ACTIONS ARE FOR INJUNCTIONS AND OTHER RELIEF; there are presently effective three preliminary injunctions, two final for lack of appeal, and one granted December 1, 1949, from which an appeal is now pending (U. S. Court of Appeals, Ninth Circuit, Fahey, *et al.*, and Federal Home Loan Bank of San Francisco, *et al.*, Appellants v. Mallonee, *et al.*, and Federal Home Loan Bank of Los Angeles, *et al.*, Appellees, No. 12511).

IV. Notwithstanding the previous decisions of the U. S. Supreme Court and of this U. S. Court of Appeals, Appellants claim that denial of a Stay of Execution would deprive Appellants of the benefits of their rights of appeal. The District Court found that to grant a stay is to deny due process.

V. Notwithstanding the previous decisions of the U. S. Supreme Court and of this U. S. Court of Appeals, Appellants claim that Notice of Appeal by a Government Agency or employee operates as an automatic stay, pursuant to Rule 62(e) F. R. C. P. Rule 62 F. R. C. P. specifically does not limit this appellate court (62(g) F. R. C. P.).

All these issues were decided adversely to the Appellants by this Honorable U. S. Circuit Court of Appeals when it, on December 5, 1947, in the matter of Ammann v. Mallonee, No. 11751, denied the prior Motion and Application for a Stay of Execution pending appeal from the former Order allowing attorneys' fees on account to counsel for Plaintiffs in the original action No. 5421-P.H.

See: (1) Findings of Fact, Conclusions of Law and Order for Interim Partial Allowance on Account

of Expenses and Attorneys' Fees Incurred by the Plaintiffs, the Shareholders Protective Committee Prior to March, 1947 [Copy attached hereto marked Exhibit "A"]. [Clk. Tr. pp. 3103 to 3115, incl.] Appeal No. 11751 U. S. Circuit Court of Appeals (9th), dismissed February 6, 1948.

(2) Order Denying Application for Stay of Execution of Order Allowing Attorneys' Fees and Expenses [Copy attached hereto marked Exhibit "B."] Appeal No. 11751 U. S. Circuit Court of Appeals (9th), Stay Denied December 5, 1947. [Clk. Tr. pp. 3234-3259, inc.]

WHEREFORE, THESE RESPONDENT APPELLEES RESPECTFULLY PRAY:

1. That this Honorable United States Circuit Court of Appeals for the Ninth Circuit again follow the precedent established in this case by:

(a) The Supreme Court of the United States in *Ex Parte Fahey, et al.*, 332 U. S. 258, 91 L. Ed. 2041—June 23, 1947; and

(b) This United States Circuit Court of Appeals for the Ninth Circuit, in *Ammann v. Mallonce*, No. 11751—December 5, 1947; and

2. That this Honorable United States Court of Appeals for the Ninth Circuit deny these Appellants' Motions for Stay of Execution of the United States District Court's Order of Payment from the Registry of the District Court of the allowance on account of attorneys' fees awarded by Order of the District Court on June 19, 1950.

Pleadings.

The FIRST Action, filed May 26, 1946, No. 5421-P.H., in the District Court of the United States, Southern District of California, entitled, Mallonee, *et al.* v. Fahey, *et al.*, is a CLASS action brought by the Plaintiffs, Mallonee, *et al.*, as the Shareholder Members Protective Committee on behalf of 16,000 such members. The action sought recovery of possession and title to approximately \$26,000,000.00, the savings of such members. Such savings were in the form of \$12,000,000.00 of deeds of trust on the homes of approximately 8,000 borrowers from said Association, and approximately \$14,000,000.00 in United States Government bonds, cash, and the office premises and building of said Association. ALL OF THE DEEDS OF TRUST AND THE THOUSANDS OF HOMES SECURING THE SAME, THE GOVERNMENT BONDS, CASH AND THE ASSOCIATION'S PREMISES AND BUSINESS WERE AND NOW ARE ALL WITHIN THE COUNTY OF LOS ANGELES, WITHIN THE TERRITORY OF THE UNITED STATE'S DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. The action was an equitable and *in rem* action, seeking also an INJUNCTION to prevent the merger and dissipation of, and to recover possession of, approximately \$26,000,000.00 of assets seized without notice, hearing or cause, from the solvent Long Beach Federal Savings and Loan Association, and praying for the cancellation of the appointment of an alleged conservator (Defendant A. V. Ammann), to quiet title to said assets in the said Long Beach Federal Savings and Loan Association and the true owners, the mutual members thereof, and for other declaratory and injunctive relief.

The SECOND Action, No. 5678-P.H., in the United States District Court, Southern District of California, entitled Federal Home Loan Bank of Los Angeles, Coast Federal Savings and Loan Association, *et al.*, Plaintiffs, v. Federal Home Loan Bank of Portland, sometimes known as the Federal Home Loan Bank of San Francisco, John H. Fahey, *et al.*, filed August 22, 1946, is also a CLASS action. This action sought to recover possession of, and title to, approximately \$46,000,000.00 of assets owned by the stockholders of said Bank. Such assets consisted of notes, collateral securing the same, consisting of many thousands of deeds of trust, United States Government Bonds, cash, office premises and business. ALL OF WHICH AND THOUSANDS OF THE PARCELS OF REAL PROPERTY SECURING THE SAME WERE PHYSICALLY WITHIN THE TERRITORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. The action was an equitable *in rem* action brought for and on behalf of all of the 172 stockholder member associations of the Federal Home Loan Bank of Los Angeles, and prays for judgment declaring Home Loan Bank Commissioner's Orders Nos. 5082, 5083 and 5084 to be null and void and to remove all clouds or purported liens from the title to, and to enjoin interference with the assets and properties of the Federal Home Loan Bank of Los Angeles, and to replevin and quiet title to all of the converted assets of the Federal Home Loan Bank of Los Angeles (amounting to approximately \$46,000,000.00 in value) summarily seized from the possession of the solvent Federal Home Loan Bank of Los Angeles on or about March 29, 1946, without prior notice, hearing or cause; and it also prays for an accounting from the Federal Home Loan

Bank of Portland and/or San Francisco, which is still withholding possession of said assets, and for other injunctive and declaratory relief.

3. Third party complaint filed July 1, 1946, by the Third Party Plaintiff, Long Beach Federal Savings and Loan Association, is likewise an equitable *in rem* action seeking the return of its property and an accounting therefor, and for INJUNCTIVE and declaratory relief to prevent the wrongful dissipation of its property, to-wit: the approximately \$26,000,000.00 of assets seized without cause, notice or hearing from the possession of the duly elected officers and directors of the solvent Long Beach Federal Savings and Loan Association.

4. The Answer and Cross-Claim in INTERPLEADER of Title Service Company was filed on June 4, 1946, and thereby interplead into the Registry of this Court 174 notes and deeds of trust securing the same, all upon parcels of real property located in Southern California, which said notes and trust deeds which then had a value of approximately \$800,000.00. Said cross-claim also interplead into the custody of said United States District Court, the titles to the homes of approximately 8,000 borrowers conveyed to said trustee as security for the payment of approximately \$12,000,000.00 in additional notes and deeds of trust. The cross-claim sought directions from the District Court to the trustee on said \$12,000,000.00 of deeds of trust as to the reconveyances or other disposition of the thousands of titles to the homes therein involved and further prayed that the Defendants-Appellants here, A. V. Ammann, Fahey, *et al.*, be ordered to deposit in the Court all moneys collected by them on said notes. This resulted in approximately \$800,000.00 in cash being deposited

in the Registry of said United States District Court, and also resulted in subsequent cash deposits eventually totaling in excess of \$1,500,000.00 in the Registry of said United States Court.

5. That by such summary seizure, without notice, hearing, or trial, of the \$26,000,000.00 in assets, representing the savings of the members of the Long Beach Association, and the \$46,000,000.00 in assets owned by the stockholders of the Los Angeles Bank, the titles to the thousands of homes conveyed to secure payment of the thousands of deeds of trust aggregating many millions of dollars, were all clouded, encumbered and impaired.

That from time to time various and numerous parties, homeowners of Southern California, have filed Petitions for INTERPLEADER and Intervention in this said litigation, and have deposited in the Registry of said United States District Court at Los Angeles, various sums in interpleader, and by Orders of said United States District Court, made from time to time, such interpleaders and interventions have been allowed and said notes and obligations released as paid off, and thereby the titles to various homes in Southern California have been cleared and the lien of said deeds of trust released from said real properties transferred by Order of Court to the monies and so deposited and remaining in the Registry of the Court.

That approximately 50 such Interpleader and Intervention Actions cleared the titles to approximately 400 of the many thousands of homes, titles to which had thus been clouded and rendered unmarketable. That by mass interpleader aggregating over \$12,000,000.00 of notes, deeds of trust, government bonds, and other assets, the clouded titles to the homes of approximately 8,000 borrowers were

cleared by two orders and judgments of the United States District Court. SAID ORDERS CONTAINED IN EXCESS OF 150 PAGES OF LEGAL DESCRIPTIONS OF THE THOUSANDS OF HOMES, TITLES TO WHICH ARE CLEARED BY SAID ORDERS.

6. That on June 12, 1946, the Defendant Robert H. Wallis, filed his Answer and Cross-claim in INTERPLEADER, and deposited in the Registry of the United States District Court a \$50,000.00 Cashier's Check, which said check is still on deposit in the Registry of the said United States District Court at Los Angeles.

7. That said United States District Court on January 23, 1948, after proceedings duly had therein, made its order removing defendant Ammann as Conservator and restoring possession of all of the assets, business, books, records and premises of said Long Beach Association to its duly elected officers and directors.

8. That all of the \$46,000,000.00 in assets of the Plaintiffs (in 5678-P.H.), Federal Home Loan Bank of Los Angeles, and some of the assets of the Long Beach Federal Savings and Loan Association, Cross-claimant (in 5421-P.H.), are still being withheld by the Appellants Federal Home Loan Bank of San Francisco, and others.

9. That on December 1, 1949, said United States District Court, upon notice and after hearings, issued its Preliminary INJUNCTION, restraining and enjoining the various parties and others therein named or designated, from in any way interfering with, or circumventing, the jurisdiction, Orders, Judgments, etc., of said U. S. Dis-

trict Court, by participating in any attempt to litigate the same issues or any of them in any other forum, including the proposed Administrative Hearing ordered by the Defendant (Appellant here), Home Loan Bank Boards' Orders No. 2015, dated September 9, 1949, or otherwise. Said Preliminary Injunction also restrained the present appellants from coercing or attempting to inflict penalties upon appellees for refusal by appellees to violate or vacate orders or judgments of the District Court.

That the appeal from said Preliminary Injunction in this Court (No. 12511), taken by the said appellants to the present appeal, is now pending with the record on said appeal in the process of being printed.

10. That numerous and various other matters, issues and pleadings, accountings, discovery proceedings, etc., are still pending in said U. S. District Court. That among such matters is the accounting by defendant Ammann for his nearly two years of operation of the business and assets, aggregating \$26,000,000.00, which he seized from said Association without notice, hearing or trial, and from the possession of which he was removed by said Order of said District Court which required such accounting to the Court.

The Facts.

"THE FEDERAL HOME LOAN ADMINISTRATION on May 20, 1946, without notice or hearing, appointed Annmann Conservator for the Association and he at once entered into possession." (*Fabey, et al. v. Malliner, et al.*, 332 U. S. 245, 91 L. Ed. 208.)

When so seized by the Appellant-Defendant, John H. Fabey, acting as the one-man Federal Home Loan Bank Administration, through his appointee, the Appellant-Defendant, A. V. Annmann, the said Long Beach Federal Savings and Loan Association was a thriving \$26,000,000.00 solvent financial institution, having an admitted surplus of approximately \$1,300,000.00. Said Association had grown from \$7,500.00 in 1934 to \$26,000,000.00 twelve years later when it was seized in 1946. [Ck. Tr. pp. 3234 to 3260, incl., Order Denying Stay of Execution re Attorneys' Fees, Exhibit "B" attached hereto.]

In the next six days following such seizure a run of withdrawals by Shareholder Members from said Long Beach Federal Savings and Loan Association was approaching a panic [see photos of run—Exhibit 11-7-40-1, Ck. Tr. pp. 14537 to 14544, incl.] and resulted in the withdrawals of approximately \$6,000,000.00 or at the rate of approximately \$1,000,000.00 a business day. [Ck. Tr. pp. 3103 to 3115 at p. 3109. See Finding No. 10, in Findings of Fact, Conclusions of Law and Former Order for Interim Partial Allowance on Account of Expenses and Attorneys' Fees, etc., Exhibit "A" attached hereto.] Said run of withdrawals had aggregated a total of approximately \$10,000,000.00.

This was the second in a series of such seizures by the same Defendants-Appellants, Fabey and his staff, led by

the Defendant-Appellant A. V. Ammann, who is still employed by the Defendant Home Loan Bank Board, as the Assistant Supervisor of the Home Loan Bank System.

Previously, on March 29, 1946, the Appellant John H. Fahey, acting through the Defendant-Appellant A. V. Ammann and his staff, without cause, notice or hearing, seized the admittedly solvent Federal Home Loan Bank of Los Angeles and its \$46,000,000.00 of assets, including its surplus of approximately \$2,000,000.00; said seizure was accomplished by the enforcement by Defendant A. V. Ammann of three purported Orders (Nos. 5082, 5083, and 5084) claimed to have been issued by the Federal Home Loan Bank Administration (composed of Defendant John H. Fahey only). By said Orders the Charter of the said Los Angeles Bank was purportedly cancelled, its assets instantaneously commingled with the assets of the Federal Home Loan Bank of Portland, which was simultaneously moved from Portland to San Francisco and its name simultaneously changed to the "Federal Home Loan Bank of San Francisco" and, also instantaneously, the terms of all directors of the said two dissolved solvent Federal Home Loan Banks of Los Angeles and Portland were terminated and a new Board of Directors ordered to be designated, subject to the approval of the Defendant John H. Fahey, and simultaneously and concurrently by said Orders, it was provided that the two sovereign States of "Nevada and Arizona shall constitute one State." [Clk. Tr. pp. 12036 to 12038, incl., Home Loan Bank Board Orders Nos. 5082, 5083 and 5084, as footnotes of the Preliminary Injunction now on appeal, Case No. 12511.]

That such summary instantaneous dissolution of the Federal Home Loan Bank of Los Angeles was without prior or other knowledge or consent of its officers, di-

return, or stockholders, or any of them. That a majority of the stockholders of said Los Angeles Bank expressly voted against such dissolution. (Ck. Tr. pp. 14242 to 14337, Exhibits No. 1-27-54-14, consisting of the letters of protest from stockholders of the Federal Home Loan Bank of Los Angeles.)

Neither did the Board of Directors, nor the Executive Committee, nor the Stockholders of the Federal Home Loan Bank of Portland, consent to the assumption of the liabilities or assets of the Federal Home Loan Bank of Los Angeles, nor to the changing of the name, nor to the moving of the Federal Home Loan Bank of Portland to San Francisco. (Ck. Tr. pp. 14443 to 14451 for Exhibit 3, pp. 14453 to 14461 for Exhibit 6A, pp. 14462 to 14466 for Exhibit 6B—Minutes of Special Meeting of Executive Committee FHLEB of San Francisco, September 15-16, 1943.)

At a joint meeting of the Stockholders of the Federal Home Loan Banks of Portland and Los Angeles, held July 28, 1947, the Stockholders adopted a Resolution protesting the merger of the said Federal Home Loan Bank of Los Angeles into the smaller Federal Home Loan Bank of Portland, in spite of the opinion then rendered by the attorney for San Francisco Bank, Verne Dusenbery, that such action was improper "since the question involved is a legal one which only the Courts can decide." (Ck. Tr. pp. 14423 to 14427, incl. Minutes of Annual Stockholders Meeting Federal Home Loan Bank of San Francisco, held at San Francisco, California, on July 28, 1947.)

The Congress of the United States caused an investigation of these confiscations to be made. After extensive hearings, the Tenth Interim Report of the Select Com-

mittee to Investigate Executive Agencies—House of Representatives of Seventy-Ninth Congress, was rendered on July 25, 1946, and at page 27 thereof, recommended:

“(1) That the Commissioner revoke the order reducing the number of districts from 12 to 11 in the Federal Home Loan Bank System.

“(2) That the Commissioner take all necessary steps to reestablish a Federal Home Loan Bank of Los Angeles and a Federal Home Loan Bank of Portland, and revoke the order or orders by which the assets of these two district banks were intermingled. . . .”

“(4) That the Commissioner revoke the order appointing a conservator for the Federal Savings and Loan Association of Long Beach and restore the assets and affairs of the association to its duly elected management, and render a proper accounting for the same, as expeditiously as is consistent with judicial determination of the questions at issue. . . .” [See Tenth Intermediate Report of the Select Committee to Investigate Executive Agencies, House of Representatives, Seventy-ninth Congress, Second Session, Pursuant to House Resolution 88—Investigation of Federal Home Loan Bank Administration, p. 27, July 25, 1946. Clk. Tr. p. 13898.]

That when seized without notice, hearing or trial, the Long Beach Federal Savings and Loan Association had loans secured by Deeds of Trust on the homes of 8,000 Southern California residents, on which loans there were approximately \$12,000,000.00 of unpaid balances. That the Trustee, holding fee title to said parcels of Southern California realty was the Title Service Company, a cross-claimant in interpleader in said action, who by bill in the

nature of interpleader, by reference to *Lis Pendens* recorded in Los Angeles County, interplead said \$12,000,000.00 worth of notes and trust deeds and the titles to said thousands of parcels of real property. [Clk. Tr. p. 3110. See Findings 13 and 14 of Findings of Fact, Conclusions of Law and Order re Expenses and Attorneys' Fees, Exhibit "A" attached hereto.]

That the United States District Court Judge hearing said litigation, allowed Petitions of Interpleader and Intervention by borrowers on notes secured by Deeds of Trust in order to enable them to secure merchantable titles to their homes and property, and to thus avoid possible demands upon them for double or multiple payment of said notes and to avoid the costs and delay of thousands of separate quiet title actions. [Clk. Tr. pp. 3110 and 3111. See Finding 15 of Findings of Fact, Conclusions of Law and Order re Expenses and Attorneys' Fees, Exhibit "A" attached hereto.]

That from June, 1946 to January 24, 1948, there were approximately fifty petitions filed for permission to intervene in this litigation by various petitioners seeking to clear the titles to their homes located within the territorial jurisdiction of the United States District Court in Southern California, which petitions affected approximately 400 parcels of real property; and pursuant to Orders of the United States District Court there was deposited in the Registry of said Court, sums in excess of \$1,500,000.00 in cash, and by Orders of the United States District Court, reconveyances of titles to the respective petitioners in intervention and interpleader were made whereby the true owners of said parcels of real property acquired merchantable title, duly insurable by title insurance companies authorized by the Insurance Department of the State of California to

issue title insurance on real property within the State of California; and in lieu of the security of the deeds of trust upon such parcels of real property so released, there remained on deposit in the Registry of the United States District Court of Southern California, funds in excess of \$1,500,000.00 pending final determination of this litigation by the Courts. [Clk. Tr. pp. 12077 and 12078. Finding 82, pp. 66-67 of the Preliminary Injunction with Findings, filed 12-1-49, now pending before the U. S. Circuit Court of Appeals for the 9th Circuit, Case No. 12511.]

That appeals were taken by Defendant Home Loan Bank Board and/or their agents (among the appellants here) on some six intervention matters, to this United States Ninth Circuit Court of Appeals, and said Appeals were all dismissed without hearings thereon. (Appeal Cases No. 11867, 9 C. C. A.) [Clk. Tr. pp. 12079 and 12080. See p. 69, Finding 83 of said Preliminary Injunction.]

That the Home Loan Bank Board, by its Order No. 388, adopted January 17, 1948, rescinded the prior Order No. 5254 of the Home Loan Bank Administration, and thereby revoked the appointment of the Defendant A. V. Ammann as Conservator of the Long Beach Federal Savings and Loan Association, and ordered that a certified copy of such resolution be "forthwith delivered to the above named court. . . ." Said resolution further ordered a full and complete accounting to the shareholders for all assets and liabilities of any and every nature pertaining to said association, and ordered that a copy of said accounting be filed with the United States District Court in and for the Southern District of California. [For text of Resolution see Clk. Tr. p. 4651.]

Subsequently on January 23, 1948, said United States District Court made its Order removing Defendant A. V.

Ammann as Conservator of said Long Beach Federal Savings and Loan Association, and ordering him to render a full and complete accounting. [Clk. Tr. pp. 12043 and 12044. See Finding 22 of said Preliminary Injunction.]

That Case No. 5421-P.H. filed in the United States District Court at Los Angeles on the 27th day of May, 1946, preserved the assets of said Long Beach Federal Savings and Loan Association by changing the trend of withdrawals so that in the period of approximately the next seven weeks, there were withdrawals amounting to only \$2,000,000.00, at the rate of only approximately \$48,000.00 per day, instead of at the rate of approximately \$1,000,000.00 per day, which was the rate of withdrawals up until the date of filing this action on May 27, 1946. That notwithstanding such slowing of said run of withdrawals, it yet aggregated a total of approximately \$10,000,000.00. [Clk. Tr. p. 3109. See Finding 10 of Exhibit "A" attached hereto.]

That on August 22, 1946, the Federal Home Loan Bank of Los Angeles, and stockholders of said bank, suing as a class, filed Action No. 5678-W.M. in said United States District Court at Los Angeles, seeking restoration of the assets of the Los Angeles Bank and the restoration of its duly elected officers to the possession thereof, which action was consolidated in November, 1947, with the prior filed action, No. 5421-P.H. [Clk. Tr. p. 12036. See Finding 12 of said Preliminary Injunction.]

That on or about January 23, 1948, the United States District Court for the Southern District of California, Central Division, made its Order appointing Attorney Ronald Walker, Special Master of the Court to supervise the restoration of the Long Beach Federal Savings and

Loan Association and its assets, wherever they might be located, to the possession of the duly elected officers and directors of the Long Beach Federal Savings and Loan Association, to supervise elections, to supervise the accountings by the removed Conservator (Defendant A. V. Ammann), and the said Court has since, from time to time, enlarged the powers of said Special Master to supervise the Discovery Proceedings and Examination of the books and records of the Federal Home Loan Bank of San Francisco, the present holder of the assets of the Federal Home Loan Bank of Los Angeles and Portland, and of some of the assets of the Long Beach Federal Savings and Loan Association. [Clk. Tr. pp. 4708 to 4711, Order of Reference to Special Master; pp. 7879 to 7883, Order for Preliminary Inspection—Discovery Proceedings—10-22-48; pp. 8160 to 8168, Order for Inspection—12-2-48; and pp. 13640 to 13646, Order Supplementing Orders of 10-22-48 and 12-2-48.]

That notwithstanding the prior judgments of the said United States District Court at Los Angeles against it, the Defendant, the Home Loan Bank Board, issued an Order No. 2015, on September 9, 1949, ordering the Long Beach Federal Savings and Loan Association to appear and show cause, if any it had, why the Defendant Federal Savings and Loan Insurance Corporation (the managing trustees of which are the same as the members of the Defendant Home Loan Bank Board), should not be appointed Receiver of the said Long Beach Federal Savings and Loan Association, and said hearing was, by the terms of said order, to commence in Washington, D. C., on October 25, 1949, at 10 o'clock A. M. [Clk. Tr. pp. 12047 to 12048. See Finding 24, p. 36, of said Preliminary Injunction.]

THAT THE REGULATIONS WHICH APPELLANTS CLAIM APPLY PROVIDE THAT THE APPOINTMENT OF SUCH FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR A FEDERAL ASSOCIATION, “. . . SHALL BE FOR THE PURPOSE OF LIQUIDATION. . . .” TITLE 24, PART 148, SECTION 148.1, SUBSECTION 10, CODE OF FEDERAL REGULATIONS.

That after extensive hearings, and the introduction of both oral and documentary evidence, the District Court, on December 1, 1949, made and entered its Order of Preliminary Injunction with Findings, restraining the parties from participating in any proceedings in any forum other than in the Courts of the United States for the determination of any of the issues then pending before said United States District Court in and for the Southern District of California. The appellants here have also appealed from said Preliminary Injunction with Findings, which appeal No. 12511 is now pending in this U. S. Circuit Court of Appeals for the Ninth Circuit. [Clk. Tr. pp. 13067 to 13072. Notice of Appeal.]

That the Defendant A. V. Ammann, immediately upon seizure of the assets of the said Long Beach Federal Savings and Loan Association on May 20, 1946, commenced dealing with Federal Home Loan Bank of San Francisco, who then had possession of the assets of the Federal Home Loan Bank of Los Angeles and/or Portland. The said Federal Home Loan Bank of San Francisco loaned some \$7,300,000.00 of the money and assets of the Federal Home Loan Banks of Los Angeles and Portland, of which it then had possession, to the said Defendant A. V. Ammann, and accepted as security for such loan, four notes signed by A. V. Ammann, purportedly

secured by assignment and transfer to said San Francisco Bank of approximately \$14,000,000.00 of trust deeds and other assets, including Government Bonds belonging to, and the property of, the said Long Beach Federal Savings and Loan Association, possession of which was obtained by defendant Ammann when he seized the association.

On March 13, 1948, upon motions duly made and after the introduction of evidence, both oral and documentary, the said U. S. District Court, in order, among other things, to clear titles to the homes of approximately 8,000 borrowers from the Association, duly made its Order requiring deposit of certain notes, deeds of trust, U. S. Government Bonds and other collateral, held by the Federal Home Loan Bank of San Francisco (the appellant here) and pursuant to said Order there has been deposited in said Court such assets amounting to approximately \$14,000,000.00 which assets still (except several thousand trust deeds to which the court has quieted title) remain on deposit in the Registry of said United States District Court at Los Angeles, awaiting disposition by further Orders, proceedings and adjudications of said Court and this Appellate Court. [Clk. Tr. p. 12065. See Finding 54, p. 54 of said Preliminary Injunction.]

That said United States District Court in making said Order, found among other things, that on March 29, 1946, the Long Beach Federal Savings and Loan Association, though not then indebted to the Federal Home Loan Bank of Los Angeles in any amount or manner whatsoever, had on deposit with said Federal Home Loan Bank of Los Angeles for safekeeping, United States Government Bonds having an approximate value of \$8,300,000.00, the possession of which bonds was acquired

by the Federal Home Loan Bank of San Francisco and/or Portland, when the assets of the Federal Home Loan Bank of Los Angeles were seized on March 29, 1946, by the Defendants Fahey, Ammann, *et al.*, and simultaneously delivered into the possession of said Federal Home Loan Bank of San Francisco.

In making said Order on March 13, 1948, requiring the deposit of said notes, trust deeds, Government bonds, etc., the said District Court specifically reserved power to make all additional Orders under said Motions and its otherwise existing jurisdiction. [Clk. Tr. pp. 5209 to 5306. See Order requiring deposit in Court of collateral, filed March 13, 1948.] (No appeal was taken therefrom and said Findings and Order have now become final.)

Approximately four hundred persons, firms, associations or corporations have heretofore been served, either with summons, order to show cause, or other process of said U. S. District Court, and have appeared or defaulted therein, and that those persons, firms, associations or corporations, who have not defaulted, claim some interest of title or right to possession, or other interest in, or to, the said approximately \$14,000,000.00 of assets, or some portion thereof, now remaining on deposit in the Registry of said U. S. District Court, and that the *res* involved in these equitable *in rem* class actions all lie within the territorial jurisdiction of said U. S. District Court in and for the Southern District of California. [Clk. Tr. p. 12066. See Finding 56, p. 55, of said Preliminary Injunction.]

That, in said litigation, which has continued during the past four years, various phases of said litigation have been presented to the U. S. Supreme Court and have been

the subject of various appeals and motions to this U. S. Circuit Court of Appeals for the Ninth Circuit, and there have been numerous and various hearings at which testimony has been taken and evidence, both oral and documentary, has been introduced, and that said hearings have resulted in Orders, Decrees and Judgments, which have now become final, which have contained various findings of fact.

Three appeals are now pending before this U. S. Circuit Court of Appeals for the Ninth Circuit, to-wit:

(1) Appeal No. 12511 (appeal from the Preliminary Injunction, filed December 1, 1948); and

(2) Appeal No. 12575 (appeal from the Order Allowing the Fees to Special Master); and

(3) Appeal No. 12591 (appeal from the Findings of Fact, Conclusions of Law and Judgment Allowing Interim Allowance on Account for Payment of Attorneys' Fees to O'Melveny & Myers and to W. I. Gilbert, Jr., attorneys of record, respectively, for Appellees Federal Home Loan Bank of Los Angeles, *et al.*, and Appellee First Federal Savings and Loan Association of Wilmington).

All other Findings of Fact contained in all other Orders, Decrees, Injunctions and Judgments have become final, either by expiration or lapse of time for appeal, or by appeals decided or dismissed. Such final findings are therefore now *res adjudicata* as to the matters therein decided, and are now the law of this case. That among others of such final Orders, Decrees, Injunctions and

Judgments, which have found, recognized, or affirmed, the jurisdiction of said U. S. District Court, are the following:

1. "Findings of Fact, Conclusions of Law and Order for Interim Partial Allowance on Account of Expenses and Attorneys' Fees incurred by the Plaintiffs, Shareholder Members Protective Committee, Prior to March, 1947";

(a) Decision announced by U. S. District Court April 7, 1947. [Clk. Tr. pp. 2184 to 2185.]

(b) Writ of Mandamus and/or Prohibition and/or Injunction, denied June 23, 1947 by U. S. Supreme Court. (*Ex parte Fahey, et al.*, 332 U. S. 258, 91 L. Ed. 2041.)

(c) Findings of Fact, Conclusions of Law and said Order made and entered by U. S. District Court, September 2, 1947. [Clk. Tr. pp. 3103 to 3115.]

(d) Application for Stay of Execution, denied September 30, 1947 by U. S. District Court at Los Angeles. [Clk. Tr. pp. 3234 to 3259.]

(e) Application for Stay of Execution, denied December 5, 1947, by U. S. Circuit Court of Appeals for the Ninth Circuit. (*Ammann, et al., v. Mallonee, et al.*, No. 11751, U. S. Ninth Circuit Court of Appeals.)

(f) Appeal from Findings, Conclusions of Law and said Order, dismissed February 6, 1948. (*Ammann, et al. v. Mallonee, et al.*, No. 11751, U. S. Ninth Circuit Court of Appeals.)

2. "Findings of Fact, Conclusions of Law and Order" dated January 23, 1948, removing the Defendant A. V. Ammann, as conservator, and restoring the possession of

the Association and its assets to its duly elected officers and directors of the said Long Beach Federal Savings and Loan Association. [Clk. Tr. pp. 12096 to 12109.]

3. Order requiring deposit of certain notes, deeds of trust, U. S. Government Bonds and other collateral held by the Federal Home Loan Bank of San Francisco, filed March 13, 1948, requiring among other things, the deposit into the Registry of the U. S. District Court at Los Angeles of certain notes, deeds of trust, U. S. Government Bonds and other collateral, held by the Defendant Federal Home Loan Bank of San Francisco. [Clk. Tr. pp. 12170 to 12267.]

4. "Findings of Fact, Conclusions of Law and Order," filed March 26, 1948, authorizing the delivery of excess collateral, consisting of notes and deeds and deeds of trust, by the Clerk of the U. S. District Court to the duly elected officers of the Long Beach Federal Savings and Loan Association. [Clk. Tr. pp. 12268 to 12349.]

5. "Findings of Fact, Conclusions of Law and Interlocutory Decree of Injunction," filed July 30, 1948. A judgment of interlocutory decree of injunction restraining various parties from prosecuting or maintaining other actions involving the same issues in Courts other than the U. S. District Court in and for the Southern District of California, Central Division, or Reviewing Courts thereof. [Clk. Tr. pp. 12141 to 12151.]

6. "Preliminary Injunction Enjoining Prosecution of Remanded Action and Order of Remand," filed February 2, 1949, being a preliminary injunction enjoining the further prosecution and maintenance of that certain action entitled "*Newendorp-Bradley v. Gregory, et al.*," No. L.B.-C-14492 in the Superior Court of California, remanded to

the Superior Court of the State of California to await final determination of the prior filed actions involving the same issues, pending in the said U. S. District Court. [Clk. Tr. p. 12069. See p. 58, Finding 62, of said Preliminary Injunction.]

7. Orders Requiring deposit of notes, deeds of trust, requests for reconveyances, reconveyances and money, for Ethel A. Cameron, filed November 28, 1947, at page 4162 of Clerk's Transcript; for Clayton T. Hobba and Melba B. Hobba, filed December 2, 1947, at page 4181 of Clerk's Transcript; for Wrigley Heights, Inc., and Wrigley Heights Second, Inc., filed November 28, 1947 at page 4170 of Clerk's Transcript; from which appeals were taken (No. 11867 to the Ninth Circuit Court of Appeals), and subsequently dismissed on February 25, 1948.

That as ordered by the District court, notice was served by registered mail upon all of the stockholders of said banks, of the time set for hearing of the various motions of the Appellees, O'Melveny & Myers and Richard Fitz-Patrick, and of the Appellee W. I. Gilbert, for allowance on account of Attorneys' Fees, that no objections in writing or otherwise, were made or registered by any of the approximately 310 stockholder member associations of said Federal Home Loan Bank of Los Angeles, Portland and/or San Francisco, excepting only by these Appellants, the Federal Home Loan Bank of San Francisco (as distinct from its member stockholders) and by the defendant Federal Home Loan Bank Board and/or its agents and employees.

The Appellee claimants to said funds are not opposing the payment from said funds of the fees allowed to said attorneys for said Plaintiffs in action No. 5678-P.H. [Rep. Tr. of April 8, 1950, at pp. 870 and 871—U. S. District Judge Hall's remarks.]

It was conceded by appellants that the Attorneys for the Plaintiffs, Federal Home Loan Bank of Los Angeles, First Federal Savings and Loan Association of Wilmington, *et al.* (in Action No. 5678-P.H. Below) actually performed the work and services claimed by them to have been performed. [See Reporter's Transcript regarding stipulation between Attorney Works and Attorney Angell, 6-19-50, at the time of settling the attorney fee order, p. 63.]

The District Court has, upon numerous and various occasions, found that it had jurisdiction of said litigation and has repeatedly exercised said jurisdiction, and in numerous Orders, decrees and judgments has specifically retained the power and jurisdiction to make further additional Orders, decrees and judgments. That some of said final findings of fact, conclusions of law, judgments and orders wherein said District Court has made findings of jurisdiction and exercised such jurisdiction are, among others, as follows:

1. "Plaintiffs' proposed Findings of Fact, and Order, for Interim Partial Allowance on account of Expenses and Attorneys' Fees incurred by Plaintiffs, the Shareholder Members Protective Committee, Prior to March 1, 1947," submitted pursuant to direction in the Opinion on the U. S. District Court announced April 7, 1947, wherein Finding No. 2 stated "That the Court has jurisdiction of the persons and subject matter involved."

Which said proposed Findings were presented to and were considered by the United States Supreme Court when said United States Supreme Court refused to issue a Writ of Mandamus and/or Prohibition and/or Injunction, but instead, recognized the jurisdiction of, and remanded the matter to, said United States District Court at Los Angeles, and relegated these Appellants to the taking of an Appeal saying:

“An allowance of \$50,000 will hardly destroy a twenty-six million dollar association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals.” (See *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041—June 23, 1947.)

2. “Findings of Fact, Conclusions of Law and Order for Interim Partial Allowance on Account of Expenses and Attorneys’ Fees Incurred by the Plaintiffs, the Shareholder Members Protective Committee, prior to March 1947,” dated September 2, 1947, wherein Finding No. 2 stated:

“(2) The Court has jurisdiction of the persons and subject matter involved.”

Said findings of jurisdiction became final on February 6, 1948, and became the law of the case when the appeal of these Appellants to this Circuit Court of Appeals for the Ninth Circuit, in the matter of A. V. Ammann, *et al.*, Appellants, v. Mallonee, *et al.*, Appellees, No. 11751, was dismissed, after the application of the same Appellants for a Stay of Execution of said Order for the payment of an Interim Allowance on Account of Attorneys’ Fees had been denied on or about the 5th day of December, 1948,

by this U. S. Circuit Court of Appeals for the Ninth Circuit.

It is now the law of this case that said U. S. District Court has jurisdiction of the persons and subject matter involved.

3. "The Order that the Petition of the Shareholders be granted and that the Conservator for the Long Beach Federal Savings and Loan Association be removed and its assets returned to the directors and officers of the Association."

which was filed in the said U. S. District Court on January 23, 1948, specifically provided, among other things, that:

" . . . the Court therefore reserves full power, both under this Order and under its otherwise *existing jurisdiction*, to make all necessary, expedient or proper additional or later Orders or Decrees of Judgment." (Emphasis added.)

There was no appeal ever taken from said Order, and the same has now become final by lapse of time.

4. "Order requiring deposits of notes, deeds of trust, requests for reconveyances, reconveyances and monies,"

resulting from various applications for intervention, by the following:

- (a) Wrigley Heights, Inc., and Wrigley Heights, Second, Inc., (to clear the title to 65 parcels of real property in Southern California), (filed November 28, 1947 and December 2, 1947, respectively).

- (b) Ethel A. Cameron (filed November 28, 1947).
- (c) Clayton T. Hobba and Melba B. Hobba (filed December 2, 1947).
- (d) Owen D. Fields and Ruby W. Fields (filed December 5, 1947).

After making Orders Permitting Intervention, in which the said U. S. District Court found:

“ . . . that pending final judgment in the within action, neither said Conservator alone, nor said Long Beach Federal Savings and Loan Association alone, nor any of the parties to this action, can, without the aid and assistance of this Court make, execute and deliver to said petitioners in intervention an effective release and discharge of the said real property described in said petition and hereinafter described, from the lien, encumbrance and obligation of said deed of trust securing said note in favor of said Long Beach Federal Savings and Loan Association; and”

“ . . . That among the injuries which would flow to said borrowers and purchasers by failing to require such deposit are, pending final judgment in the within action, the (1) inability to secure a merchantable title, to the real property involved which in turn would prevent either a sale thereof or a loan thereon, or a payment and termination of interest on the present loan, and (2) a multiplicity of suits which would involve all of the issues raised or which can be raised in the instant litigation and all of the parties to the present litigation; which injury and damage is hereby found to be grave, irreparable and continuing insofar as the instant borrowers . . . are concerned.”

appeals were taken by certain of the present Appellants from the above four out of approximately 50 of such orders made by the District Court during the first 20 months of said litigation. Subsequently said Appeal No. 11867, *A. V. Ammann, etc., v. Mallonee, et al.*, was, on February 25, 1948, dismissed by the said U. S. Circuit Court of Appeals for the Ninth Circuit Court, and the mandate of said Appellate Court issued.

That the said U. S. District Court has its jurisdiction over matters of interpleader and intervention and involving real property within the district of said U. S. District Court and that said orders and judgments have now become final, and are now the Law of the Case.

5. The "Order requiring deposit of certain notes, deeds of trust, U. S. Government Bonds, and other collateral held by the Federal Home Loan Bank of San Francisco."

Filed in said U. S. District Court on March 13, 1948, therein specifically found that:

" . . . all of the assets and properties, herein described, notes, deeds of trust, U. S. Government Bonds, and other collateral, are physically within the confines and boundaries of the Southern District of California and thus physically within the *jurisdiction* of this court. . . ." (Emphasis added.)

and in the Order specifically further provided:

" . . . The Court therefore reserves full power, both under this Order and the Order to Show Cause and the Motion which brought this proceeding to this hearing and also under its *otherwise existing jurisdiction* to make all necessary expedient or proper additional or later Orders, Decrees or Judgments." (Emphasis added.)

No appeal from said Finding and Order was ever taken and therefore said Finding of Jurisdiction and Order have become final and are now the law of this case.

6. The "Order for delivery of notes and trust deeds (excess collateral) from the Clerk of the Court to Long Beach Federal Savings and Loan Association"

which was filed in said U. S. District Court on March 26, 1948, again specifically provided at page 82 of said Order:

" . . . The Court therefore reserves full power, both under this Order and under the Order dated March 13, 1948, and the Order to Show Cause and Motions which brought that proceedings to hearing and *also under its otherwise existing jurisdiction* to make all necessary, expedient or proper additional, or later Orders, Decrees or Judgments." (Emphasis added.)

No appeal was taken from said Order, which has now become final and now is the law of the case.

7. "Findings of Fact, Conclusions of Law and Interlocutory Decree of Injunction"

filed in said U. S. District Court on July 30, 1948, in Finding 11 thereof, specifically found:

" . . . That said proceedings orders, activities or other matters would interfere with the interpleader jurisdiction of this Southern District Court and would impede, harass, and obstruct the execution of its process, orders and judgment, and would expose said parties to the danger of having to litigate in two separate United States District Courts in separate districts the same matters which they have already litigated for more than two years in this Southern District Court. . . ."

No appeal was taken from said Findings and Order which have now become final and are now the law of this case.

8. "Preliminary Injunction enjoining prosecution of remanded action and Order for Remand."

which was filed in said U. S. District Court on February 2nd, 1949, and that said Order specifically found on pages 16-17 thereof:

"that it is equitable and proper that all such conflicting and contradictory claims of the litigating class plaintiffs and their derivative stockholders actions, if litigated in any court, should all be presented to, and considered by, this court *having jurisdiction in interpleader in addition to all other grounds of jurisdiction.*" (Emphasis added.)

That no appeal was taken from said Findings of Fact of jurisdiction and Order and the time for appeal having now elapsed, the said Finding of Jurisdiction and Order have become final and are now the law of the case.

9. In one of the most recent orders entitled "Findings of Fact, Conclusions of Law and Order for Substitution for Parties Plaintiff"

filed in said U. S. District Court on or about April 5th, 1950, Finding No. 3 on page 3 thereof, specifically finds:

"(3) That this court has heretofore, after extended hearings by various orders, held that it has jurisdiction of the parties and subject matter of the within litigation, from certain of which orders appeals were

taken by the Home Loan Bank Board and/or its agents and thereafter dismissed, and upon which order, as well as said other orders so holding, the time to appeal has passed for a considerable period.”

That no appeal has been taken from said “Findings of Fact, Conclusions of Law and Order,” although the same is a final order as it provided on page 5 thereof:

“This order of Substitution of parties plaintiff is a final judgment and the court expressly determines that there is no just reason for delay and expressly directs and orders the forthwith entry of this judgment of substitution of parties plaintiff.”

This said “Findings of Fact, Conclusions of Law and Judgment was duly entered on April 6, 1950, in Judgment Book No. 65, page 99, Records of said U. S. District Court at Los Angeles. [Clk. Tr. pp. 19216-19220.]

That such findings of jurisdiction and Order of Substitution have therefore now become final and again establish the law of the case to be that the said U. S. District Court in and for the Southern District of California, Central Division, has had, and does have, jurisdiction of the parties and subject matter of the litigation.

That the Interim Allowance of Attorneys’ Fees to said Plaintiffs’ counsel in the amount of \$75,000.00 is approximately one-seventh of one percent (1/7th of 1%) of the assets of said Federal Home Loan Bank of Los Angeles, when seized on March 29, 1946, and is less than one-fifteenth of one percent (1/15th of 1%) of the present

combined assets of the Federal Home Loan Bank of San Francisco and/or Los Angeles and/or Portland.

That the District Court found in awarding attorneys' fees to said plaintiffs, as follows:

"11. That a portion of the books and records of San Francisco Bank reveal that out of the funds in the possession of the San Francisco and/or Portland Bank hereinbefore described and which funds consisted of assets of the Los Angeles Bank co-mingled with the funds of the Portland Bank, the said San Francisco Bank has paid, for the purpose of resisting plaintiffs' claims, the sum of approximately \$100,000.00 to defray legal expenses and attorney fees in addition to indirect or other expenses not presently known." [Clk. Tr. p. 19750.]

To permit the Defendant Federal Home Loan Bank of San Francisco to use over \$100,000.00 of the seized funds of Federal Home Loan Bank of Los Angeles to aid and assist it in continuing to withhold such funds from their rightful owners while at the same time permitting the Federal Home Loan Bank of San Francisco, and its co-defendant Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann, *et al.*, to delay and deprive the Plaintiffs, Federal Home Loan Bank of Los Angeles and their stockholders, of the use of even such a small proportion of their funds as one-seventh of one percent of their seized assets, in an effort to recover the possession of their seized assets, is a gross injustice and one which the said

U. S. District Court would not permit and which this Honorable U. S. Circuit Court of Appeals for the Ninth Circuit should not countenance.

The District Court also found that this litigation was commenced and is being maintained by the plaintiffs in both class actions in good faith, for the purpose of protecting and preserving the rights and interests, and recovering the assets of their respective shareholder and stockholder members. [Clk. Tr. pp. 19755-19756; Findings 16 and 17 of the said Preliminary Injunction.]

The District Court also found that due process of law and ultimate justice require a trial of, and the determination of, this entire matter on the merits, both legal and factual. That in view of the whole record, one copy of which now weighs in excess of 150 pounds, it will amount to a denial of right of counsel to compel the Plaintiffs, the said Federal Home Loan Bank of Los Angeles and their stockholders, to pay counsel fees in such litigation and, likewise, it would amount to a denial of right of counsel to compel the Plaintiffs, Federal Home Loan Bank of Los Angeles and its stockholders and their counsel, to await the final determination of all the issues of said litigation for payment of said attorneys' fees. ~~[Clk. Tr. pp. 19760-19761. Conclusion No. 7 of Findings of Fact, Conclusion of Law and Order re Allowances of Attorneys' Fees on Account, filed 6-19-50.]~~ (Clk. Tr. pg 1974)

Order denying stay, filed 6-19-50)

Stay Should Be Denied.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED THAT this, the third delaying attempt of the Appellants to prevent the payment of attorneys' fees to counsel for the various Plaintiffs seeking to recover possession of assets seized from their respective clients, should also be denied as:

(1) It is the law of this case that said U. S. District Court had, and has, jurisdiction of said litigation; and

(2) The services admittedly have been rendered and performed; and

(3) Admittedly the amount of \$75,000.00 is a reasonable allowance on account for the services so rendered. That the District Court, after full hearing, in the exercise of its discretion, found there was no cause or justifiable reason for delaying the payment from funds on deposit in the Court's Registry, of the attorneys' fees allowed. The Honorable Court of Appeals should likewise deny the application for stay of payments of said attorneys' fees.

"Justice delayed is Justice Denied."

Respectfully submitted,

WESTOVER & SMITH,

By WYCKOFF WESTOVER,

*Attorney for Plaintiff-Appellees Mallonee, et al.,
Shareholder Members Protective Committee.*

CHARLES K. CHAPMAN,

*Attorney for Cross-Claimant Long Beach Federal
Savings and Loan Association.*

POINTS AND AUTHORITIES.

A. Jurisdiction.

The Said U. S. District Court Had, and Still Has, Jurisdiction of the Persons and Subject Matter Involved in Consolidated Cases Nos. 5421-P.H. and 5678-P.H.

I.

That said actions involve:

1. More than \$3,000.00, to-wit: Approximately Seventy Million Dollars (\$70,000,000.00) of assets, all seized and all located in California when said actions were filed, and which now amount to approximately One Hundred Twenty-five Million Dollars (\$125,000,000.00) of assets; and

2. Diversity of citizenship between the plaintiffs, Mallonee, *et al.*, Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, the Plaintiffs, Federal Home Loan Bank of Los Angeles and its numerous associations, all having their home offices in California, and the Defendants Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, and the Defendants John H. Fahey, a citizen of Massachusetts, the Defendant A. V. Ammann, a citizen of Maryland, the Federal Savings and Loan Insurance Corporation, a corporation of Washington, D. C., and numerous and various other citizens of other states, all parties defendant; and

3. There are numerous and various Federal questions and interpretations of the U. S. Constitution and Federal Enactments, among others, being:

(a) The taking of property without due process of law;

(b) The constitutionality and construction and validity of "Home Owners Loan Act of 1933," 48 Stat. 128; 12 U. S. C. 1461 *et seq.*;

(c) "The Federal Home Loan Bank Act," 47 Stat. 725; 12 U. S. C. 1421, *et seq.*; 15 U. S. C. 602;

(d) "The National Housing Act," 48 Stat. 1246; 12 U. S. C. 1724, *et seq.*;

(e) "The First War Powers Act of 1941. . . ." 55 Stat. 838; 50 U. S. C. App. 601, *et seq.*; and "Executive Order No. 9070 issued February 24, 1942";

(f) "Reorganization Act of 1945," 59 Stat. 613; 5 U. S. C. 133y; and

(g) "The Rules, Regulations, Directives and Orders purportedly made and adopted pursuant to, or under, each or any of said Acts."

II.

In Rem jurisdiction pursuant to Section 1655 (former Section 118), Title 28, U. S. Code, vested in said U. S. District Court in and for the Southern District of California, Central Division at Los Angeles over both of said consolidated actions which were brought to enforce, among other things, claims to, and recovery of, real and personal property located within the territorial jurisdiction of the said U. S. District Court at Los Angeles.

III.

Interpleader Jurisdiction, pursuant to:

(a) General Law Equity practices;

(b) Rule 22, F. R. C. P.; and

(c) Sections 1335, 1397 and 2361 (former Section 41-26) of Title 28, U. S. Code;

vested in said U. S. District Court at Los Angeles, over said actions into which there has been interplead, and there now remains, approximately \$14,000,000.00 of assets on deposit in the Registry of said U. S. District Court in and for the Southern District of California, Central Division at Los Angeles.

IV.

The law of this case has been established to be, that said U. S. District Court in and for the Southern District of California, Central Division at Los Angeles, has jurisdiction of the subject matter of said litigation and of the parties wherever they may be found.

A. The U. S. Supreme Court has twice recognized with approval, the jurisdiction of said U. S. District Court at Los Angeles over said litigation.

First: When it reversed the judgment of unconstitutionality of Section 5(d) of the Home Owners Loan Act of 1933, and remanded the entire proceeding "without prejudice to any other administrative or judicial proceedings which may be warranted by law. The Judgment is reversed."

Fahey, et al., v. Mallonee, et al., 332 U. S. 245; 91 L. Ed. 2030 (6-23-47).

Second: When the U. S. Supreme Court denied leave to these Appellants to file a petition for a writ of mandamus and/or prohibition and/or injunction, against Judge Peirson M. Hall of the U. S. District Court for the Southern District of California, to vacate his order allowing fees to counsel in:

Fahey, et al., v. Mallonee, et al., supra,

and to "Prohibit any further allowance therein, and to enjoin any further payments heretofore allowed."

Justice Jackson, in said opinion, stated on behalf of the U. S. Supreme Court:

“We find nothing in this case to warrant their use. An allowance of \$50,000 will hardly destroy a \$26,000,000 association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants’ grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs. The petition is denied.”

Ex Parte Fahey, 332 U. S. 258; 91 L. Ed. 2041.

Petitions for Writs of Mandamus and/or Prohibition and/or Injunction traditionally primarily attack and put in issue the question of jurisdiction of the trial court, and certainly had there been any question as to the jurisdiction, or extent thereof, of the said U. S. District Court, the Supreme Court would have permitted the filing of the petitions for Writ of Mandamus and/or Prohibition and/or Injunction.

B. This U. S. Court of Appeals for the Ninth Circuit has followed the precedent of the U. S. Supreme Court and has likewise recognized that the said U. S. District Court in and for the Southern District of California, Central Division at Los Angeles has had, and has, jurisdiction of the persons and subject matter involved, when it, on June 1, 1950, denied leave to these Appellants to file a Motion for a “Writ of Prohibition, Mandamus or other Appropriate Relief and for Leave to Show Cause,” in the matter of United States of America, *et al.*, Petitioners, vs. Peirson M. Hall, District Judge, *et al.*,

Respondents, which was filed in this court on March 1, 1950. In said Petition for Extraordinary Writ, the Petitioners again made the wornout attack upon the jurisdiction of the trial court, and repeatedly urged lack of jurisdiction.

C. The denial by the U. S. Supreme Court and by this U. S. Circuit Court of Appeals for the Ninth Circuit, of the two applications for Writs of Mandamus and/or Prohibition and/or Injunction "*a fortiori*" are findings by the U. S. Supreme Court and this Court of Appeals that said U. S. District Court at Los Angeles did have and has jurisdiction of said litigation and the parties thereto.

D. The Law of the Case has been established by final Findings of Fact, Conclusions of Law and Orders, Judgments and Decrees that the U. S. District Court, in and for the Southern District of California, Central Division, at Los Angeles, has jurisdiction of the subject matter and the parties and has repeatedly exercised such jurisdiction in making such final Orders and Decrees. Some of the final Findings of Fact, Conclusions of Law, Orders and/or Decrees in which the jurisdiction of said U. S. District Court has been found and/or exercised, are among others:

(1) Plaintiffs' proposed Findings of Fact, etc., *re* Allowance on Account of Attorneys' Fees, which were considered by the United States Supreme Court in *Ex Parte Fahey*, 332 U. S. 258; 91 L. Ed. 2041, wherein petitions for extraordinary writs were denied June 23, 1947.

(2) Findings of Fact, etc., and Order for Allowance on Account of Expenses and Attorneys' Fees, which were presented to and considered by this U. S. Circuit Court of

Appeals for the Ninth Circuit in the matter of A. V. Ammann, *et al.*, Appellants, v. Mallonee, *et al.*, Appellees, No. 11751, wherein this Court following the precedent of the U. S. Supreme Court, recognized with approval, the jurisdiction of the U. S. District Court at Los Angeles in the above appeal, which was dismissed on February 6, 1948.

(3) The Order removing the Defendant A. V. Ammann, as Conservator of the Long Beach Federal Savings and Loan Association, made on January 23, 1948, wherein said U. S. District Court exercised its jurisdiction and restored the assets of said \$26,000,000.00 institution to its duly elected officers and directors, from which said Order no appeal has ever been taken.

(4) Order made March 13, 1948, wherein said U. S. District Court granted a petition in the nature of interpleader, and exercised its jurisdiction by requiring the Defendant Federal Home Loan Bank of San Francisco, and others, to deposit into the Registry of said U. S. District Court, assets held by it amounting to approximately \$14,000,000.00 in value, and from which said Order no appeal has ever been taken.

(5) Order dated March 26, 1948, wherein said U. S. District Court at Los Angeles exercised its jurisdiction and ordered its clerk to deliver from the Registry of said Court all excess collateral and to restore same to the Long Beach Federal Savings and Loan Association, from which Order no appeal has ever been taken.

(6) Findings of Fact, and Interlocutory Decree of Injunction issued June 30, 1948, wherein said U. S. District Court exercised its jurisdiction to protect its own jurisdiction from proceedings, activities or other matters which would interfere with its interpleader jurisdiction,

from which said interlocutory decree of injunction no appeal was ever taken.

IT IS THE LAW OF THIS CASE THAT the said U. S. District Court in and for the Southern District of California, has at all times had, and still has, jurisdiction of the said litigation and the parties thereto.

B. The District Court at Los Angeles, Within Whose District the Assets Were Seized, and Are Yet Situated, Has Jurisdiction to Determine Ownership and Possession of Such Assets.

The jurisdiction of the District Court *in rem*, arises under several main headings. They are set forth in detail in the Conclusions of Law, pages 72 to 78 inclusive, of the Preliminary Injunction appealed from in Appeal No. 12511. Summarized, such sources of jurisdiction are:

(1) Title 28, Section 118, U. S. C. as it existed in 1946 when the litigation was commenced, and as presently embodied in new Title 28, Section 1655. (The Lis Pendens describing the real property, homes of approximately 8,000 borrowers on \$12,000,000.00 of deeds of trust seized by the defendants, was recorded among the first documents in the action.)

(2) Interpleader jurisdiction:

(a) Under the inherent equity powers of federal courts derived from equity practice at the time of the adoption of the United States Constitution;

(b) Statutory interpleader under Title 28, Section 41, Subdivision 26, as it existed at the commencement of the litigation in 1946, and as presently embodied in Title 28, Sections 1335, 1397 and 2361; and

(c) Interpleader under Rule 22 F.R.C.P.

(3) By general appearances of the defendants before the Court, by official resolutions adopted and certified. Such resolutions were by their terms to be filed with the Court and directed accountings and other proceedings to be had by and before the District Court.

(4) By the Administrative Procedure Act, see particularly Section 1009 U. S. C. A., Subdivision (a) which reads in part:

“ . . . RIGHT OF REVIEW. Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

The agency action here complained of was the seizure of title and possession of over \$70,000,000.00 of real and personal property, all situated within the district of the District Court. At the time of the second attempted seizure, approximately \$14,000,000.00 of assets to be seized were then physically in the registry of the District Court, as a result of the then pending litigation, and a *Lis Pendens* describing several thousand parcels of real estate conveyed as security for \$12,000,000.00 of notes and deeds of trust, was all recorded in the office of the County Recorder in Los Angeles County.

(5) Section (b) of Section 1009 continues:

“(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the ab-

sence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. . . .”

The court of competent jurisdiction over the \$14,000,000.00 in the registry of the District Court at Los Angeles, the \$12,000,000.00 in deeds of trust secured by thousands of parcels of real property in Los Angeles County, and over the \$70,000,000.00 seized assets yet within the Southern District of California, can only be the District Court for the Southern District of California, whose jurisdiction *in rem* over such assets is the subject of the attacks made in these pending appeals before this Honorable Court of Appeals.

(6) Diversity of citizenship, federal questions, over \$3,000.00 involved, are all covered in complete detail in the pleadings and will not be repeated here.

Much confusion has arisen from the efforts of the appellants-defendants to intermix immunity from suit with their argument of lack of jurisdiction in the District Court. If such appellants-defendants are, as they contend, beyond the powers of any court and immune to suit, no court could have power over them, but the lack is not of jurisdiction over the property, physically within its territory and within its registry, but it might not be able, if certain of the defendants are immune to suit, to adjudicate the rights of those defendants in the property.

For such defendants to adopt a resolution, which by its terms directs that a certified copy thereof be filed with the Court, and that an accounting be made by their subordinates to the Court, and later to claim that the same Court

is without jurisdiction to adjudicate the same accounting, is a somewhat inconsistent position to state it mildly. Immunity to suit has never existed on the part of any of the appellant-defendants in this action, but if it did, it has been completely waived by the general appearances, by an official resolution duly certified, and filed with the Court as required by the terms thereof. [For text of resolution see Clk. Tr. p. 4651.]

In *Omaha National Bank of Omaha v. Federal Reserve Bank of Kansas City, Missouri* (26 F. 2d 884 F. C. A. 8, 1928), the Court stated:

“This suit was brought under section 118, tit. 28, USCA (Judicial Code, Section 57), by the Omaha National Bank of Omaha, Nebraska, against Federal Reserve Bank of Kansas City, Missouri, Wyoming National Bank of Casper, Wyoming, First National Bank of Cheyenne, Wyoming, and T. E. McClintock, receiver of the First National Bank of Cheyenne, Wyoming, and was dismissed on the grounds that the Court was without jurisdiction.”

In reversing the lower Court's action, the Appellate Court stated:

“Accepting the allegations as stating the true facts, we think the \$60,000.00 transferred to the credit of Wyoming National Bank in the Omaha Branch bank was personal property within the Court's jurisdiction, to which plaintiff asserted an equitable claim and title, and in that respect the suit was one properly brought under Section 118. . . .”

In *Commonwealth Trust Co. v. Reconstruction Finance Corp.*, 28 Fed. Supp. 586 (W. D. Penn. 1939), a suit was

brought for the recovery of certain pig iron, allegedly wrongfully withheld, similar to the situation in the instant case, the Court stated:

“We shall first consider the objection made to the jurisdiction of this Court. Defendant contends that as a corporation under the laws of the United States, all of whose capital is owned by the United States, and whose principal office is located in the District of Columbia, it is not suable in this district. These facts appear in the Statute creating this corporation. See 15 U. S. C. A. Sections 601, 602.”

“The property involved in this law-suit is located in this District. It is in the possession of the defendant through its authorized agent. The plaintiff claims he is entitled to this property. We therefore hold that the Defendant is suable in this District in an action to recover it. If we find the plaintiff is entitled to it, we may then apply the proper remedy as authorized by the new Federal Rules of Civil Procedure.” Motion to dismiss was denied.

Railway Express v. Jones, 106 F. 2d 341 (1949),
7 C. C. A.

This was a class action brought on behalf of numerous victims of a swindle in which each of the individual losses had been less than \$500.00 but the total exceeded \$24,000.00, and in which the Collector of Internal Revenue asserted a claim to the \$24,000.00 for non-payment of Income Tax, by the claimed perpetrators of the fraud. The Railway Express Company having the \$24,000.00 moved to file its bill in the nature of interpleader, but the trial

court denied the motion. The Circuit Court of Appeals reversed, and ordered the interpleader to be allowed, stating:

“Where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to relief under this section is absolute.

. . .

“By proceeding under the counter-claim of the Railway Express the jurisdiction of the court will be unassailable, and the claims of all claimants may be litigated exactly the same as in a proper class suit.”

U. S. v. Union Pacific and Western Union Telegraph (160 U. S. 3, 40 L. Ed. 319, 1894).

The Supreme Court said:

“But a suit in equity by the United States against both companies for the purpose of annulling the agreements under which the telegraph company claims rights adverse to the United States, can embrace all the matters in controversy and authorize a comprehensive decree that will terminate all disputes among the parties as to such matters.” (Citing *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 567 (36 L. Ed. 537, 543).)

Further in the opinion, the Supreme Court also said:

“We are of the opinion that the circuit court properly adjudged that equity had jurisdiction to give full relief in respect of all matters in issue between the United States and the defendant companies.”

C. When Two or More Tribunals May Each Take Jurisdiction of an Action, the Tribunal Wherein Jurisdiction First Attaches Holds It to the Exclusion of All Others Until Its Duty Is Fully Performed and the Jurisdiction Involved Is Exhausted.

Conrad v. West, 98 A. C. A. (Cal.) 125 (6-15-50)
(219 P. 2d 477).

In deciding this case, wherein the owner of a dwelling house had attempted to bring an Unlawful Detainer Action after an O. P. A. action in the U. S. District Court, Southern District of California, to recover excess rent paid had been commenced, the California Appellate Court stated:

“When a state court and a court of the United States may each take jurisdiction of an action, the tribunal where jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted.”
(Citing cases.)

Judgment was reversed, with instructions to the Superior Court to abate the State Court action until final decision in the Federal Court action.

In *Covell v. Heymann*, 111 U. S. 176 (1883), wherein the Plaintiff sued to replevin her personal property from the Defendant, U. S. Marshall, who held it pursuant to an execution issued by a U. S. Circuit Court against the judgment debtor, the U. S. Supreme Court, in reversing the Michigan State Supreme Court, which had held in favor of the Plaintiff, stated, through Justice Matthers (at p. 182):

“It is a principle of right and of law and, therefore, of necessity. It leaves nothing to discretion or

mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues.”

“‘The jurisdiction of a court,’ said Chief Justice Marshall, ‘is not exhausted by the rendition of its judgment but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised.’ *Wayman v. Southard*, 10 Wheat., 1.”

Covell v. Heymann, *supra*, was cited, and its principles have been approved in *Ponzi v. Fessenden*, 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607 (1922), and most recently in *Conrad v. West*, 98 A. C. A. 125 Cal. (6-15-50).

V.

The Court first assuming and acquiring jurisdiction over the property, subject matter of the litigation, may, and should, exercise that jurisdiction to the exclusion of all other forums and may, and should, issue its restraining orders and injunctions if and when necessary to restrain the Parties from commencing, maintaining, prosecuting

or participating in any actions involving the same properties in any other forum.

Rickey Land and Cattle Company v. Miller and Lux, 218 U. S. 258 (1910);

Penn. Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850 (1934);

Cramer v. Phoenix Mutual Life Ins. Co., 91 F. 2d 141 (1937) (Certiorari denied 301 U. S. 685 (1937)).

VI.

A Court of equity having interpleader jurisdiction has jurisdiction to issue all necessary and appropriate Orders and Injunctions to protect its jurisdiction, including the issuing of Injunction Orders to restrain actions in other forums.

Treinies v. Sunshine Mining Co., 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85 (1939);

Dugas v. American Surety Co., 82 F. 2d 953; affirmed in 300 U. S. 414, 81 L. Ed. 720, 57 S. Ct. 515 (1936).

In *Eagle Star & British Dominion v. Tablack*, 15 F. Supp. 933 (D .C.), So. Cal., the U. S. District Court at Los Angeles announced that it is a well established principle that in a subsequently filed interpleader action, an injunction should issue to restrain the prosecution of a prior filed admiralty action involving the same property.

VII.

The jurisdiction of a Federal Court having once attached, cannot be taken away, diminished, or interfered

with, by proceedings subsequently instituted in any other forum.

Peoples Bank of Belleville v. Winslow in re Calhoun Interpleader, 102 U. S. 101; Charles Otto 256 (1880);

Holbrook Irrigation Dist. v. Arkansas Valley Land Co., 54 F. 2d 840 (C. C. A. 10 (1931)).

VIII.

A court which had jurisdiction of an action when commenced, does not lose jurisdiction by a subsequent change of law, cutting down its jurisdiction.

Dillon v. Superior Court, 98 A. C. A. 654 (July, 1950).

IX.

The U. S. District Courts in the exercise of, and to protect their respective jurisdiction, have power to, and should when necessary, restrain the acts of Federal officers, agencies and boards.

Land v. Dollar, 330 U. S. 731 (1946).

The U. S. Maritime Commission was restrained from selling the Plaintiffs' property, to-wit: the plaintiffs' stock.

Hynes v. Grimes Packing Co., 237 U. S. 86, 93 L. Ed. 1231 (May, 1949), wherein the Secretary of the Interior was enjoined from enforcing certain restrictive provisions of the Alaskan Fishery's General Regulations until final determination of the main action in the trial courts.

Williams v. Fanning, 332 U. S. 490, 91 L. Ed. 95 (1949), wherein the Postmaster at Los Angeles was restrained from seizing the Plaintiffs' money orders.

Philadelphia Company v. Stimson, 223 U. S. 604, 56 L. Ed. 570 (1912), wherein Mr. Justice Hughes in delivering the unanimous opinion of the Court, stated:

“First. If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.” (Citing a long list of cases, including): *U. S. v. Lee*, 106 U. S. 196.

X.

In Class Actions such as this, where the subject matter and the primary parties are within the U. S. District Court's jurisdiction, all members of all classes concerned must be bound by the decree of such U. S. District Court and, hence, if necessary, it should issue appropriate preliminary injunctions and other Orders to restrain all parties of all classes to such litigation from instituting, prosecuting, or participating in the piecemeal trial of such equitable actions in any other forum.

Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356, 65 L. Ed. 673 (1921).

XI.

It is not necessary that the litigation be finally concluded before a court of equity has power to make an allowance for the attorneys' fees being incurred in pursuing, obtaining or preserving a common fund.

Numerous cases have sustained this equitable doctrine—some of which are as follows:

Sprague v. Ticonic Bank, 307 U. S. 161 (1938);
Trustees v. Greenough, 105 U. S. 527 (1881), leading case;

Cowdry v. Galveston, 93 U. S. 352 (1876);

New York Dock Co. v. Poznon, 274 U. S. 117;

Clarke v. Hot Springs Electric Light & Power Co.,
65 F. 2d 612 (1932); certiorari denied 287 U.
S. 619, 77 L. Ed. 537 (1932);

Carter v. American Insurance Co., 3 Peters 307
(1828);

Ruby Lee Minar Ins. v. Hammett, 53 F. 2d 149
(1931);

Warren v. Palmer, 310 U. S. 132 (1940);

Winslow v. Ferguson, 25 Cal. 2d 274 (1934);

Eggerts v. Pacific States Savings and Loan Co.,
53 Cal. App. 2d 554 (Petition for hearing by
Calif. Supreme Court, denied 9-21-42).

D. Justice Delayed Is Justice Denied.

Appellants are NOT entitled to a stay as a matter of right.

The appellants contend that they are entitled to a stay of payment of attorneys' fees allowed on account, "as a matter of right." The same contention was made by Appellant on the former application to this Court for a Stay of Execution of the previous allowed attorneys' fees on account. This U. S. 9th Circuit Court of Appeals there, in *Ammann et al. v. Mallonee, et al.*, No. 11751, decided said issue adversely to the Appellant when it, on

December 5, 1947, denied the former application of the Appellant for a Stay of Payment of Attorneys' Fees.

The subject matter as to Stay of Execution of Judgment pending appeal is governed by the provisions of Subdivision (d) of Rule 73 of the new F.R.C.P. which became effective on September 1, 1938, and the 1946-47 amendments thereto which became effective March 19, 1948. (See *Dickinson v. Petroleum Conversion Corporation*, 94 L. Ed. 280 (Advance Sheets), decided by the Supreme Court on January 16, 1950.)

The first sentence of Subdivision (d) of Rule 73 F.R.C.P. indicates that:

The matter of a stay on appeal is a matter of discretion with the Court to whom application is made as it provides:

“ . . . Whenever an appellant *entitled thereto* desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires . . . ”
(Emphasis added.)

Likewise in Subdivision (e) of Rule 73, F.R.C.P., the last sentence provides:

“ . . . After the action is so docketed, application for *leave* to file a bond *may* be made only in the appellate court . . . ” (Emphasis added.)

If a stay of execution was a matter of right there would be no need for filing an application for a leave to file a bond, nor would there be any need to *present* to the court, for its approval, a bond. It is significant that in each instance the language used is permissive, not mandatory, indicating that this Appellate Court has not been

deprived of its discretionary power to either grant or deny a stay as it in its sole discretion deems equitable and just.

Likewise, the language of Rule 62, Subdivision (a), (d) and (g), when read together, is significant.

Rule 62(a) provides:

“ . . . Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, *shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal . . .*”
(Emphasis added.)

THE ACTIONS HERE INVOLVED SEEK INJUNCTIONS,
AMONG OTHER THINGS.

Subdivision (d) of Rule 62, F.R.C.P., specifically exempts such injunction actions from its application.

Subdivision (g) of Rule 62, F.R.C.P., provides that the power of the Appellate Court in regard to matters of stay of execution for payment under judgments are not limited by the provisions of Rule 62, F.R.C.P.

Hence, none of the provisions of Rule 62, F.R.C.P., are applicable to this present application to this Ninth Circuit Court of Appeals for a Stay of Payment of Attorneys' Fees from money on deposit in the Registry of the said U. S. District Court at Los Angeles.

This Honorable Circuit Court of Appeals has its traditional discretion as a court of equity with which it may explore the equities of both sides in granting or denying a Stay, and after satisfying itself as to those matters make

its own order, not as an automatic rubber stamp underwriting of the appellants' appeal but as determined by this Honorable Circuit Court's own judgment and discretion.

For a more complete discussion of this question see 'Response of Plaintiffs, Shareholder Members Protective Committee, in opposition to Motion and Application of Appellant, A. V. Ammann, for Stay of Execution of Order for Interim Allowance on Account of Expenses and Fees, and brief in support thereof, in these Appellants' former appeal No. 11751. Points I and II (pp. 30-59, incl.)

It is significant that the cases relied upon by applicants for a stay were decided before the adoption of the present F.R.C.P., and under former statutes whose language has been substantially and significantly changed when adopted, in 1938, into F.R.C.P., Rules 62, 73 and 75.

The cases of *Goddard v. Ordway*, 94 U. S. 672 decided in 1876 and the case of *McCourt v. Singers-Bigger*, 150 Fed. 102, decided in 1906, are not in point and were distinguished in the prior application for stay of payment of attorneys' fees, which was denied. (See *Ammann, et al. v. Mallonee, et al.*, No. 11751, U. S. Circuit Court of Appeals for the Ninth Circuit, Appellees' Response, pp. 64-68).

McCourt v. Singers-Bigger (cited by appellants), 150 Fed. 102 (C. C. A. 8th, 1906).

This case is not now the law and cannot be controlling. This is demonstrated by the last sentence of the opinion which reads:

"Under the law neither the court below nor this court, during the pendency of this appeal, is empowered to execute the decree."

The Federal Rules of Civil Procedure (which completely revise the system of law in effect in 1906), expressly provide that in injunction cases, it is within the discretion of the District Court or the Court of Appeals, if any or all, or any part of any orders, judgments or decrees of either court are to be enforced or stayed during the pendency of the action or during the course of appeal.

The error in the *McCourt-Singers-Bigger* decision as applied to present laws, is not easy to discover unless this final sentence of the opinion be considered. Under the statutes as they then existed neither the District Court nor any appellate court had any power over money held by a receiver of the court which could not be suspended by the losing party by the mere filing of a supersedeas bond. No order of either court was required to effectuate or allow the bond or supersedeas. In other words, one of the litigants and not the court, had the final say over the money in the hands of the Court's receiver, at least as long as the litigant could keep appeals pending in any of the appellate courts.

But Rule 62(a) reads in part as follows:

“Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings . . . Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, . . . shall not be stayed during the period after its entry and until an appeal is taken OR DURING THE PENDENCY OF AN APPEAL . . .” (Emphasis added.)

The decision of *McCourt v. Singers-Bigger* has therefore been expressly repudiated by the United States Supreme Court when it adopted the foregoing language of Rule 62(a) F.R.C.P., which has been the law since 1938.

The same applies to the case of:

Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237 (1876).

A brief quotation from the opinion of that case will disclose that the law, when the case was decided, is different than the law now. The opinion says in part, at page 672 of the U. S.:

“A supersedeas upon the appeal of the suit in equity operates to stay the execution of the decree appealed from.”

Again further on:

“A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the Act of Congress in that behalf.”

The Acts of Congress mentioned in both of these decisions have long since been repealed by the Federal Rules of Civil Procedure and those Rules do not grant a stay of orders or judgments or in an injunction suit *as a matter of right to any party*. They require a direct order of the District Court or of the Court of Appeals. The District Court has made its order denying such stay but has ordered a temporary stay until this Honorable Court of Appeals can pass on the question of whether there should be a stay pending the decision of the appeal. This Honorable Court of Appeals has overruled both *Goddard v. Ordway* and *McCourt v. Singers-Bigger* in its denial of a motion for similar stay, when on December 5, 1947, certain of these same appellants attempted to stay a prior order allowing payment of attorneys fees from funds in the registry of the District Court and the stay of such order was denied by this Honorable Court of Appeals.

See also:

In re Spier Aircraft Corporation, 137 F. 2d 736 (1943).

(Decided subsequent to the adoption of the Federal Rules of Civil Procedure, and in reference to F.R.C.P., 62(e), herein discussed, the Court stated:

“The appeal to this court did not operate as a stay of proceedings.”

The U. S. Supreme Court, apparently, approved of this interpretation, as it denied the petition for certiorari in 1944 (321 U. S. 770).

XII.

Where the Judgment Is Self-executing and Does Not Require a Writ of Execution, Its Effect Can Only Be Suspended by an Affirmative Order Either of the Court Which Makes the Decree or of the Appellate Tribunal.

There is a tremendous distinction between an order of an Equity Court directing its receiver or its Clerk to dispose of certain funds in the custody of the receiver or Clerk and a money judgment against one of the parties to the proceedings, to be enforced by a levy of execution and sale of defendants property. Appellants labor under the misapprehension and tend to delude the court into the error of assuming that this is a money judgment against them to be enforced by execution. The very terms of the order itself disclose that it is but an incidental interlocutory matter necessary to the prosecution of the main litigation.

The general litigation here is over \$70,000,000.00 worth of seized assets. The Court below has found that

in order to enable the plaintiffs, whose assets were thus seized, to prosecute their action for the recovery of such assets, an allowance of part of the seized assets, in this case about one-seventh of one per cent ($1/7$ th of 1%) should be made immediately available to the plaintiffs who own the money. This is not a money judgment against appellants in any sense whatsoever. It is an administrative order of the Court to its own officer, the Clerk, authorizing the immediate return to the plaintiffs, who own the money, of a part of their own money seized from these plaintiffs by appellants. In the face of this situation, appellants contend that by the mere filing of an appeal, they suspend the power, both of the trial court of equity and this Honorable Circuit Court of Appeals to administer the funds in the hands of the Clerk and this without the consent of either court and against the express will, order and direction of the trial court. Such contention is completely untenable.

A parallel situation existed in the case of:

Hovey v. McDonald, 109 U. S. 152, 27 L. Ed. 888 (1883).

There litigation had arisen over a claim against the United States and a receiver had been appointed to collect part of the claim and hold it pending the disposition of the litigation between the claimants. The Court sustained demurrers to the bills in equity and ordered that they be dismissed. The Court also ordered the receiver to pay over the money in the receiver's hands to the prevailing parties in the litigation. An appeal was taken immediately from the Order of Dismissal, and from the order for paying over of the money. The attorneys for the prevailing party demanded of the receiver that the

money be immediately paid over. All parties went before the Judge and the receiver asked that he be instructed. The Judge told him to carry out the order of the Court. The attorneys for the losing party announced that they would immediately file any supersedeas or stay bond which the Court might fix and gave notice to the Court and the receiver before the money was paid. It is conceded that in so far as the losing parties could do so, they had taken every step possible to perfect their appeal and obtain a supersedeas or stay, except that the Court had not made a stay order.

The U. S. Supreme Court distinguishes between the types of cases which are automatically suspended by an appeal and the type of cases which require an affirmative order on the part of the trial or the appellate court before a stay is effective, and held the order to the receiver to pay over the money to be an order not subject to *execution* as it was not a judgment against the losing party. It therefore was governed by chancery or equity proceedings and its effectiveness and stay depends on rules other than the statutes.

The U. S. Supreme Court said at page 159:

"But this case is not within the terms of the rule. There was no decree for a specific sum of money; there was no decree at all in favor of the complainants; and no execution was applicable to, or could be issued in the case, except an execution for the costs of the defendants. The truth is, that the case is not governed by the ordinary rules that relate to a supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an

appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to a supersedeas can only be brought in by way of analogy.

“In this country the matter is usually regulated by statute or rules of court, and generally speaking an appeal, upon giving the security required by law, when security is required, suspends further proceedings and operates as a supersedeas of execution. This, as we have seen, is the case in the Circuit Courts of the United States. *But the decree itself, without further proceedings, may have an intrinsic effect which can only be suspended by an affirmative order either of the court which makes the decree, or of the appellate tribunal.*”

The Court continues on page 162:

“Applying these principles to the present case, it is clear that the force of the decree was not affected by the appeal, although it was in the power of the Special Term to have continued the injunction and to have retained the fund in its control in the hands of the receiver had it seen fit to do so.” (Emphasis added.)

It is thus apparent that an order by a court of equity upon money in the hands of its receiver is not stayed *even by filing a supersedeas bond*. The stay is one which is to be obtained only by an order by either the trial or the appellate court which order is to be granted or refused in the discretion of such court. Such an order was sought from the Court below and was by that Court re-

fused. In the order making such refusal the Court below said:

“The within litigation has been pending since May 27th, 1946; it is of an extremely complex nature; all parties to the within proceeding on the allowances of attorneys’ fees have proceeded with diligence and good faith to bring the multiple claims among the numerous parties in the actions in chief to issue; at least since May 10, 1949, if not from the inception of the litigation, all parties have proceeded on the basis that no fees would be collected by counsel in whose favor the above order runs except upon court order, after adversary proceedings; the matter of the entire litigation is proceeding in one phase or another almost daily and requires the constant attention of counsel; the objections to the payment of the fees directed to be paid by the above order, were based entirely on matters of law which have heretofore been repeatedly urged upon and repeatedly rejected by this court and have been set forth in various findings, orders and judgments, reference to which is hereby made, from which judgments and orders either no appeal was taken, or the time for appeal has long since expired, or in some instances appeals were taken and later dismissed.

“In view of the foregoing it appears that it would be an abuse of discretion and a denial of the right to counsel, to grant a stay of the above order, and the same is denied . . .” [Clk. Tr. p. 19741.]

After such action by the Court below, it would require a most extraordinary showing, before this Court would

wish to disturb the discretion of the Court who heard the case and is most familiar with it. A case that illustrates this principle is:

Cumberland Telephone and Telegraph Co. v. Louisiana Public Service Commission, 67 L. Ed. 217, 260 U. S. 212 (1922).

The Supreme Court of the United States in considering an application for stay of execution, said:

“But the court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits, and therefore is familiar with the record. Records in cases like this are often very voluminous. Such is the record in this case. Without abdicating our unquestioned power to grant such an application as this, and conceding that exceptional cases may arise, we are generally inclined to refer applications of this kind to the court of three judges who have heard the whole matter, have read the record, and can pass on the issue without additional labor. That was the course taken by this court in Southern R. Co. v. Watts, No. 927, October Term, 1921. Per Curiam, decided May 29, 1922. (259 U. S. 576, 66 L. Ed. 1071, 42 Sup. Ct. Rep. 585.) A similar order will be made here . . .” (Emphasis added.)

Another case in which the United States Supreme Court refused to grant a stay where the court below had refused one, was:

Magnum Import Company v. Coty, 262 U. S. 159, 67 L. Ed. 922 (1923).

The application must be made in the first instance to the trial or lower court and when determined by them (unless

discretion is abused) will not be reversed by the appellate court. In this case, the U. S. Supreme Court said:

“When, therefore, after the petition is filed and before its submission, an application is made for a suspension of the judgment or decree of the circuit court of appeals, a heavy burden rests on the applicant.

“The petition should, *in the first instance*, be made to the circuit court of appeals, which, with its complete knowledge of the cases, may, with full consideration, promptly pass on it. That court is in a position to judge, first, whether the case is one likely, under our practice, to be taken up by us on certiorari; and, second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate. It involves no disrespect to this court for the circuit court of appeals to refuse to withhold its mandate or to suspend the operation of its judgment or decree pending application for certiorari to us . . . This is a matter, however, wholly within its discretion. If it refuses, *this court requires an extraordinary showing before it will grant a stay of the decree below* pending the application for a certiorari, and even after it has granted a certiorari, it requires a clear case and decided balance of convenience before it will grant such stay . . .

“Coming, now, to the circumstances presented on the inquiry before us, we find nothing to justify our granting the motion. It is clear that *the circuit court of appeals gave full consideration to a similar motion, and, with a much fuller knowledge than we can have, denied it. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a matter.*” (Emphasis added.)

See also, the cases of:

Virginian Railway v. United States, 272 U. S. 658 (1926);

Rice Railway Corporations v. Lathrop, 278 U. S. 509 (1929);

Alabama v. United States, 279 U. S. 229, 73 L. Ed. 675 (1929).

An extremely strong showing of abuse of discretion is required. Let us examine what showing if any, the appellants have made on the question of abuse of discretion. They have made no factual showing either by affidavits or otherwise in the Court below or to this Honorable Circuit Court of Appeals on the question of stay below. They make no showing whatsoever that the Court below committed any abuse of discretion and this is easily understandable because the contrary is the case. If the Court below is correct in its findings (which are not attacked in any way in this motion), that a denial of these funds to plaintiffs would be a denial to them of the rights of counsel, the court below would have abused its discretion if it had granted the stay. It is conceded for the purpose of this motion by the applicant, that to have granted a stay would have been a denial of counsel to the plaintiffs. *Yet the appellants are asking this Honorable Court of Appeals to do just that.*

The denying of a Stay is within the equitable discretion of this U. S. Circuit Court of Appeals, to permit the Appellants, who have been, and are still currently, using the funds seized from the Appellees for the payment of their own attorneys' fees, even on this appeal, to further stay and deprive the Appellees of the right to use some of their own monies (approximately 1/7th of 1% of the

funds seized from them) to pay their own attorneys' fees in seeking to recover, from the Appellants, the funds so seized, is a gross injustice which the U. S. District Court would not permit, and which this Honorable U. S. 9th Circuit Court of Appeals should not countenance.

As found by the U. S. District Court after full hearing, the granting of a stay of execution may amount to a depriving of the Appellants of the right to counsel for "JUSTICE DELAYED IS JUSTICE DENIED."

Respectfully submitted,

WESTOVER & SMITH,

By WYCKOFF WESTOVER,

*Attorney for Appellees Mallonee, et al., Plaintiffs
Below, Shareholder's Protective Committee
for 16,000 Shareholders of the Long Beach
Federal Savings and Loan Association,*

CHARLES K. CHAPMAN,

*Attorney for Appellee Long Beach Federal Sav-
ings and Loan Association, Cross-claimant and
Third Party Plaintiff.*

EXHIBIT "A."

In the District Court of the United States, in and for the Southern District of California, Central Division.

Paul Mallonee, C. H. Newhouse and Winnie Bucklin, Individually, and as Representatives of a Class, suing for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, an Association organized and existing under and by virtue of the laws of the United States of America, Plaintiffs, v. John H. Fahey, Individually, John H. Fahey as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, individually and A. V. Ammann, as the purported Conservator for the Long Beach Federal Savings and Loan Association, The Long Beach Federal Savings and Loan Association, Title Service Company sued herein as John Doe One (Cross-claimant in Interpleader), R. H. Wallis, sued herein as John Doe Two (Cross-Claimant in Interpleader), *et al.*, Defendants.

"Sub Nominae" Home Investment Company of Long Beach, a corporation, Intervenor, v. Paul Mallonee, *et al.*, and John H. Fahey, *et al.*, Defendants in Intervention.

The Long Beach Federal Savings and Loan Association, Defendants and Third Party Plaintiffs, v. Federal Home Loan Bank, *et al.*, Third Party Defendants.

Robert H. Wallis, Defendant and Third Party Plaintiff, v. John H. Fahey, *et al.*, Third Party Defendants.

Title Service Company, a corporation, Defendant and Third Party Plaintiff, v. John H. Fahey, *et al.*, Third Party Defendant.

Federal Home Loan Bank of Los Angeles, etc., Third Party Defendant and Cross-Complainant, v. Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, *et al.*, Third Party Cross-Defendants. Civil File No. 5421-P.H.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR INTERIM PARTIAL ALLOWANCE ON ACCOUNT OF EXPENSES AND ATTORNEYS FEES INCURRED BY THE PLAINTIFFS, THE SHAREHOLDERS PROTECTIVE COMMITTEE, PRIOR TO MARCH, 1947. SUBMITTED PURSUANT TO DIRECTION IN THE OPINION OF THE COURT ANNOUNCED APRIL 7, 1947.

The motion of the plaintiffs, the Shareholder Members Committee, suing as representatives of the shareholder members of the Long Beach Federal Savings and Loan Association, for an interim allowance on account to reimburse the plaintiffs for their expenses and attorneys' fees incurred by them in their efforts for the protection and preservation of the funds and assets of the said association, from being merged, consolidated or commingled or otherwise lost or dissipated prior to March 1, 1947, having been previously filed with supporting exhibits and points and authorities by the plaintiffs on March 6, 1947, and this court having on said day made its order setting the 24th day of March 1947, at the hour of 10:00 o'clock A. M. in Court Room No. 3, located in the Federal Building at Los Angeles, California, as the time and place for the hearing of said motion, and the court on March 6, 1947 made its order that notice of the filing of said motion and of the time and place of the hearing thereof should be given by the plaintiffs, the Shareholders Members Protective

Committee, to all parties who have appeared in the action by service of a copy of said order upon their respective solicitors or attorneys and that the Shareholders Members Protective Committee give public notice of the filing of said motion and of the time and place of the hearing thereof by publication of the said order of this court, on or before the 12th day of March, 1947, in the following newspapers of general circulation in the County of Los Angeles, State of California, to wit:

- (1) The Long Beach Independent,
- (2) The Long Beach Press Telegram, and
- (3) The Los Angeles Daily Journal;

And the notice of the time and place of the hearing of said motion and the publication of the said order fixing the time and place of the said hearing, having been duly given pursuant to said order and by publication as aforesaid of said order, thus giving notice to the shareholder members of the said Long Beach Federal Savings and Loan Association and affidavit of publication of said order having been filed and the plaintiffs having served and filed the affidavits of John W. Preston, former Justice of the California Supreme Court, and L. R. Martineau, Jr., Esquire, setting forth their respective expert opinions of the reasonable value of the services rendered by counsel for the plaintiffs and the matter having duly and regularly come on for hearing on the 24th day of March, 1947, at the hour of 10:00 o'clock A. M. and no person having appeared or filed any objection thereto, save and except the defendant A. V. Ammann, and the hearing of said motion having been duly and regularly continued upon the court's own motion to the 7th day of April, 1947, and the defendant A. V. Ammann having served and filed documents entitled

“Resistance to Motions” and “Supplemental Points and Authorities in Support of Resistance to Motions,” and the plaintiffs, the movants herein, having duly served and filed their Closing Statement and Points and Authorities within the time allowed by the court, and the resistor, the defendant Ammann, having filed no counter affidavits denying or contravening the said affidavits or other factual documents filed by the plaintiffs, the matter came on regularly for hearing at 10:00 o’clock A. M., on the 7th day of April, 1947, and none of the shareholder members of the said Long Beach Federal Savings and Loan Association having made any objection thereto, and no other persons having made any objection to the granting of the said motion for an interim allowance on account of attorneys’ fees and expenses, save and excepting only the resistor-defendants A. V. Ammann and John H. Fahey;

And there appearing Wyckoff Westover, Esquire, of the firm of Westover and Smith, attorneys for the plaintiffs; Ronald L. Walker, Esquire, Assistant United States Attorney, and Ray E. Dougherty, Esquire, Associate General Counsel of the Federal Home Loan Bank Administration, representing the resistor-defendants, A. V. Ammann and John H. Fahey; Charles K. Chapman, Esquire, appearing for the defendant and cross-complainant Long Beach Federal Savings and Loan Association; H. O. Wallace, Esquire, of the firm of Thomas and Wallace, appearing for the defendant and cross-claimant in interpleader, Title Service Company, a corporation, and Raymond Tremaine, Esquire, appearing as attorney for the defendant and cross-claimant in interpleader, Robert H. Wallis;

And the Court having offered the opportunity to any and all persons and parties in the court room to present

further or additional testimony or objection and there being none offered and the resistor-defendant, A. V. Ammann and John H. Fahey having presented no contravailing affidavits or oral or documentary evidence and the matter having been argued at length; the matter was submitted for decision.

The Court, being fully advised in the premises now finds:

FINDINGS OF FACT.

(1) that proper notice of the hearing of said motion has been duly and regularly given, both by service on counsel and by publication, and

(2) that the Court has jurisdiction of the persons and subject matter involved, and

(3) that no objections have been made by any of the shareholder members whose money and funds are here involved, and

(4) that no objection has been made by any other person or persons, excepting only, the resistor-defendants A. V. Ammann and John H. Fahey, and

(5) that the shareholder members represented by the plaintiffs the Shareholder Members Protective Committee are the actual owners of the funds and assets of the Long Beach Federal Savings and Loan Association, which is a mutual association and that they are legally and equitable entitled to use a small portion of their own funds for the protection and preservation of the corpus of the main fund which consists of the assets and funds of the Long Beach Federal Savings and Loan Association, and to prevent the merger, consolidation, or commingling of the Long Beach Federal Savings and Loan Association, and/or its

assets, with any other association or institution and to preserve the said funds and assets of said association and to prevent further runs and to protect against their further dissipation by the resistor-defendants A. V. Ammann and John H. Fahey, and to aid and assist in obtaining the ultimate return of the Long Beach Federal Savings and Loan Association and its assets, to the management of their, the shareholder members, own choice, and

(6) The plaintiffs, herein, the Shareholder Members Protective Committee are duly and regularly licensed and authorized to transact and carry on business as such in the State of California, by virtue of license No. L. A. A37621, file No. 80282 L. A. issued pursuant to Chapter 784, Statutes of 1937 of the State of California, and duly renewed on the 2nd day of January, 1947, by the Department of Investments, Division of Corporations, of the State of California, and

(7) That the defendants John H. Fahey and A. V. Ammann intended to merge or consolidate the Long Beach Federal Savings and Loan Association with other financial institutions and did intend thereby to destroy its identity and goodwill and to commingle and disperse its assets and memberships by commingling them with the assets and memberships of other financial institutions, and thus render moot the questions presented in this litigation, and

(8) That the filing and prosecution of the suit herein did protect and preserve the association and its assets and funds, in that it prevented the defendants or some of them from dissipating and breaking up the Long Beach Federal Savings and Loan Association, its membership shares and organization, by merging, consolidating, re-organizing or

uniting said association, or commingling said association's assets, membership shares, or members with other organizations, banks, corporations, associations, or institutions, which would thereby have caused an immediate and irreparable loss and damage to the plaintiffs and other shareholder members of the Long Beach Federal Savings and Loan Association, as found by the undersigned from the factual showing made before him on May 27, 1946, in a restraining order issued on said date, and

(9) That the terms of said restraining order issued on the 27th day of May, 1946, continued in full force and effect, and became a portion of the decree of the three-judge statutory court, made on September 30, 1946, which portion of said decree was not stayed in the stay order issued by the Honorable Justice Wiley Rutledge, Associate Justice of the United States Supreme Court, on October 1, 1946, and

(10) That in the six days from the date of seizure on May 20, 1946, of the said association's property by the appellant Ammann and the filing of the within suit on May 26, 1946, the run of withdrawals of money by shareholder members was approaching a panic and resulted in the withdrawals of approximately six million dollars (\$6,000,000.00) or at the rate of approximately one million dollars (\$1,000,000.00) a business day; that the filing of the within action on the 27th day of May, 1946 preserved the assets of said association by changing the trend of withdrawals so that in the period of approximately the next seven weeks withdrawals amounted to only two million dollars (\$2,000,000.00) or at the rate of only approximately forty-eight thousand dollars (\$48,000.00) per business day; that had said trend of withdrawals not been changed, said association would have been nearly or com-

pletely destroyed by the withdrawal of shareholder members, and

(11) That by long established custom and usage in real estate transactions in Southern California, and particularly in the County of Los Angeles, State of California, titles are not acceptable to purchasers, nor can real property be encumbered in regular channels, except upon the issuance of a policy of title insurance by a dependable, established title insurance company licensed under the laws of the State of California, and

(12) That loans upon real property in the State of California are not ordinarily secured by mortgages, but instead, trust deeds are used almost exclusively, by which the fee title to the property encumbered is deeded to a third party, usually a corporation, which acts as trustee with the power of foreclosure, and which trustee, upon the payment of the indebtedness, must execute a deed of reconveyance upon the request of the payee in the note which payee is referred to as the beneficiary in the deed of trust, and

(13) That said association had loans on approximately eight thousand (8,000) parcels of land in the face amount of approximately twelve million dollars (\$12,000,000.00) of unpaid balances, and

(14) That the Trustee holding fee title to all of said parcels of property was and is Title Service Company, defendant, and cross-claimant in interpleader herein, and

(15) That at all times after the seizure by said Ammann of the property and records of said Association on May 20, 1946, the officials of said association refused to recognize the validity of said seizure and as a result thereof a controversy developed between said Ammann and said Association, which controversy made it impossible for said

Title Service Company to determine whether or not after payment by the debtor, a reconveyance of the fee title should be made by said Title Service Company, as such trustee, upon demand of said Ammann, or on demand of said Association; that as a result of said controversy, the undersigned District Judge has allowed petitions in intervention by borrowers on notes secured by trust deeds, in order to enable them to secure merchantable titles to the property, and to thus avoid demands upon them for double payment of said notes and to avoid the costs and delay of foreclosures, and

(16) That by the maintenance of the within suit, the plaintiffs herein and their counsel have provided a means and inducement for all of the persons having loans from said association to pay said loans and secure valid reconveyances, and also to secure policies of title insurance, which were otherwise not obtainable and without which they would have had no merchantable title to their property, and

(17) That the value of the services of the firm of attorneys Westover & Smith and their associates, in representing the plaintiffs the Shareholder Members Protective Committee up to March 1, 1947, in their endeavor to protect and preserve the said Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately sixteen thousand (16,000) shareholder members, is substantially in excess of the sum of fifty thousand dollars (\$50,000.00), and

(18) That an interim allowance on account of such attorneys' fees and a partial satisfaction thereof can be made at this time without endangering the solvency of the said association; that there is on deposit now in the reg-

istry of this court funds belonging to the Long Beach Federal Savings and Loan Association in excess of eight hundred thousand dollars (\$800,000.00), from which an interim partial allowance on account of such attorneys' fees for services rendered prior to March 1, 1947 can be safely made; that a reasonable amount to be allowed at this time on account of and in partial satisfaction of such attorneys' fees is the sum of Fifty thousand Dollars (\$50,000.00), which is less than one-fifth of One percent of the assets of said association to-wit: Twenty-six Million Dollars (\$26,000,000.00); and

(19) That the plaintiffs, the Shareholder members Protective Committee, have incurred extraordinary expenses in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets, and properties, which prior to March 1, 1947, amounted to fifteen thousand five hundred thirty and 29/100 (\$15,530.29) dollars, and that said plaintiffs, the firm of Westover & Smith and their associate Daniel W. O'Donoghue, Jr., have expended the sum of one thousand five hundred thirty-four and 77/100 (\$1,534.77) dollars and two hundred thirty and 07/100 (\$230.07) dollars, respectively, for the protection and preservation of the Long Beach Federal Savings and Loan Association, and its assets and properties, and that they are entitled to reimbursement therefor; and

(20) That there was no objection by said petitioners or any other party to the jurisdiction of respondent District Court at any time SINCE THE ISSUANCE OF THE STAY ORDER, issued by the Honorable Justice Wiley Rutledge on October 1, 1946, until motions were made by the resistor-defendants Fahey and Ammann to the United States Supreme Court for Writ of Mandamus and/or Prohibition

and/or Injunction, which said Writ was denied by the United States Supreme Court, although there have from time to time been allowed numerous interventions and deposits in Court, after motions and notices duly served upon all necessary parties. Said interventions have been allowed on behalf of borrowers who desired to pay off their indebtedness to enable them to secure clear title to their property.

CONCLUSIONS OF LAW.

From the foregoing findings of fact the Court now makes and renders its conclusions of law.

That from the moneys and funds of the Long Beach Federal Savings and Loan Association now on deposit with the Clerk of this Court the plaintiffs and their counsel are entitled to be paid the following amounts of money to the following persons, to-wit:

1. To the plaintiffs the Shareholder Members Protective Committee for the extraordinary expenses which they have incurred in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties during the period prior to March 1, 1947, the sum of Fifteen Thousand Five Hundred Thirty & 29/100 (\$15,530.29) Dollars.

2. To the firm of Westover & Smith, Attorneys for the plaintiffs, to reimburse them for the costs and expenses incurred by them for the period prior to March 1, 1947 in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties, the sum of One Thousand Five Hundred Thirty-four & 77/100 (\$1534.77) Dollars incurred during the same period of time and for the same purposes

by their Associate Counsel in Washington, D. C., Daniel W. O'Donoghue, Jr., Esquire;

3. To Westover & Smith, Attorneys for the plaintiffs, as an interim partial allowance on account of attorneys' fees for the professional services rendered by them and their associate, Daniel W. O'Donoghue, Jr., Esquire of Washington, D. C., in representing the Shareholder Members Protective Committee in its endeavor to protect and preserve the Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately Sixteen Thousand (16,000) shareholders and members during the period of time prior to March 1, 1947—the sum of Fifty Thousand Dollars (\$50,000.00)—on account.

JUDGMENT.

It Is Hereby Ordered, Adjudged and Decreed that the plaintiffs and their counsel have Judgment for the following amounts of money payable to the following persons from the funds and assets of the Long Beach Federal Savings and Loan Association, and the Clerk of this Court Is Hereby Ordered to pay from the moneys and funds of the Long Beach Federal Savings and Loan Association now on deposit with him in this action the said following amounts of money to the following persons:

1. To the plaintiffs the Shareholder Members Protective Committee for the extraordinary expenses which they have incurred in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties during the period prior to March 1, 1947, the sum of Fifteen Thousand Five Hundred Thirty & 29/100 (\$15,530.29) Dollars.

2. To the firm of Westover & Smith, Attorneys for the plaintiffs, to reimburse them for the costs and expenses incurred by them for the period prior to March 1, 1947, in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties, the sum of One Thousand Five Hundred Thirty-four & 77/100 (\$1534.77) Dollars incurred during the same period of time and for the same purposes by their Associate Counsel in Washington, D. C., Daniel W. O'Donoghue, Jr., Esquire;

3. To Westover & Smith, Attorneys for the plaintiffs, as an interim partial allowance on account of attorneys' fees for the professional services rendered by them and their associate, Daniel W. O'Donoghue, Jr., Esquire, of Washington, D. C., in representing the Shareholder Members Protective Committee in its endeavor to protect and preserve the Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately Sixteen Thousand (16,000) shareholders and members during the period of time prior to March 1, 1947—the sum of Fifty Thousand Dollars (\$50,000.00)—on account.

Dated at Los Angeles this 2nd day of September, 1947.

/s/ PEIRSON M. HALL,
PEIRSON M. HALL, *Judge.*

EXHIBIT "B."

In the District Court of the United States, in and for the Southern District of California, Central Division.

Paul Mallonee, C. H. Newhouse and Winnie Bucklin, Individually, and as Representatives of a Class, suing for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, an Association organized and existing under and by virtue of the laws of the United States of America, Plaintiffs, vs. John H. Fahey, Individually, John H. Fahey as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, Individually and A. V. Ammann, as the purported Conservator for the Long Beach Federal Savings and Loan Association, The Long Beach Federal Savings and Loan Association, Title Service Company, sued herein as John Doe One (Cross-Claimant in Interpleader), R. H. Wallis, sued herein as John Doe Two (Cross-Claimant in Interpleader), *et al.*, Defendants. No. 5421-PH.

ORDER DENYING APPLICATION FOR STAY OF EXECUTION
OF ORDER ALLOWING ATTORNEYS FEES AND EXPENSES.

On the 10th day of September, 1947, before the undersigned United States District Judge, an oral application having been made in open Court by James M. Carter, United States Attorney, by Ronald Walker, Assistant United States Attorney and by Ray E. Daugherty, Associate General Counsel for the Home Loan Bank Board for an Order staying execution of the Order of this Court, dated September 2, 1947, allowing interim partial fees and expenses incurred prior to March 1, 1947 to the plain-

tiffs, the Shareholder Members Protective Committee and to Westover and Smith, their attorneys, said application having been made in the presence of Wyckoff Westover of Westover and Smith, attorneys for the plaintiffs; Charles K. Chapman, Attorney for the defendant, cross-claimant and third party plaintiff, Long Beach Federal Savings and Loan Association; Raymond Tremaine, Attorney for defendant and cross-claimant Robert H. Wallis; H. O. Wallace of Thomas and Wallace, Attorneys for defendant and cross-claimant Title Service Company; John Whyte of O'Melveny and Myers, Attorneys for defendant and cross-claimant Federal Home Loan Bank of Los Angeles; and

Said application for such stay of execution having been made without prior notice of motion, without supporting points and authorities, without supporting affidavits or other factual showing of any nature whatsoever; and

There having been filed on behalf of the plaintiffs and appellees the Shareholders Members Protective Committee, an affidavit and points and authorities opposing the granting of a stay of execution of said Order, allowing interim partial fees and expenses; and

The matter having been argued by counsel for such parties as desired to be heard, and the Court having considered the affidavit, points and authorities, presented by the plaintiffs and appellees, having considered the records and files in the entire proceedings, and the Court being fully advised in the premises and it appearing to the Court:

(1) That "The Federal Home Loan Administration on May 20, 1946 without notice or hearing, appointed Ammann conservator for the Association and he at once

entered into possession.” (Fahey v. Mallonee, United States Supreme Court Opinion, Case No. 687, October Term, 1946.) That this litigation was commenced on May 27, 1946, by the plaintiffs, subsequently formed into and acting herein as the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, following said seizure by the defendants John H. Fahey as the Federal Home Loan Bank Commissioner and his appointee, A. V. Ammann, as the conservator for said Association, said Association having been at the date of seizure, May 20, 1946, a solvent institution having assets of approximately Twenty Six Million Dollars (\$26,000,000.00) which said seizure followed by approximately two months the seizure of the solvent Forty Six Million Dollars (\$46,000,000.00) Federal Home Loan Bank of Los Angeles by the defendant John H. Fahey, in which Federal Home Loan Bank said Association then had on deposit for safe-keeping government bonds alleged to exceed Five Million Dollars (\$5,000,000.00) in value and in which Federal Home Loan Bank said association owned stock alleged to be in excess of Three Hundred Thousand Dollars (\$300,000.00) and

(2) It further appearing that the plaintiffs were licensed by the State of California to act as such Shareholders Committee under License No. LA-A 37621 issued pursuant to Chapter 784, Statutes of 1937, of the State of California, by the Department of Investments, Division of Corporations; and that said Shareholder’s Committee have been authorized in writing, by more than a majority, to wit: approximately fifty-six percent (56%) of the shareholder-members of said Long Beach Federal Savings and Loan Association to represent them; and that Westover and Smith, as the attorneys for the plaintiffs, there-

fore represent more than a majority of the shareholders in said Association; and

(3) It further appearing that considerable additional litigation was carried on by the plaintiffs in conjunction with litigation herein referred to, including the representation of said Shareholders in numerous matters of Interpleader and Interventions during the course of which there has been deposited in the registry of this Court in excess of One Million Two Hundred Thousand Dollars (\$1,200,000.00) in cash; and

(4) It further appearing that no objection of any sort whatsoever has been raised to the allowance of said fee and expense money by any shareholder or depositor-member, or any other private person, entity or corporation ultimately concerned in ownership interest of the assets and funds of said association. That the only objection made to said allowance of said money and the only application for Stay of Execution of said allowance has come from appellant Ammann and the other seizing defendant, after notice as required by the Federal Rules of Civil Procedure and after wide public notice of the hearing on said application having been given on special order of court, by publication in two daily newspapers of the City of Long Beach, California, the city wherein said Association is located, and in one of the daily newspapers of the City of Los Angeles, California, the city wherein said hearing was had, and after the consideration of numerous and lengthy affidavits by lay persons and expert witnesses, and no contravailing factual matters having been presented in opposition; and

(5) It further appearing that the money from which said interim partial fees and expenses would be paid in money on deposit in the registry of this Court; and

(6) It further appearing that after said hearing and prior to the making of any formal order thereon, the defendants John H. Fahey and A. V. Ammann, did petition the Supreme Court of the United States for a Writ of Prohibition and/or Mandamus and/or Injunction to prohibit and restrain the undersigned Judge from further acting on said application for fees and expenses; and

(7) It further appearing that the Supreme Court of the United States did in an opinion filed on June 23, 1947, deny said petition for a Writ of Prohibition and/or Mandamus and/or Injunction; and

(8) It further appearing that this Court in deference to the Supreme Court of the United States, having desisted from any further proceedings until after said decision by the Supreme Court, did on September 2, 1947 make and enter its order allowing a partial interim allowance on account of attorneys fees to the firm of Westover and Smith, plaintiffs; attorneys, in the sum of Fifty Thousand Dollars (\$50,000.00), and make its further order for the payment to said law firm of the sum of One Thousand Five Hundred Thirty Four and 77/100 (\$1534.77) Dollars, and order the payment to the plaintiffs of the sum of Fifteen Thousand Five Hundred Thirty and 29/100 (\$15,530.29) Dollars, as and for expenses incurred by them, all of such allowances relating to services and expenses incurred prior to the 1st day of March, 1947; and that a true and correct copy of said order of September 2, 1947 is for convenience, attached hereto, marked "Exhibit A," and the findings and conclusions therein are in-

corporated herein by reference with the same force and effect as though the same were herein set forth in full; and

(9) It further appearing that the defendant A. V. Ammann did on the 8th day of September, 1947, file with this Court his Notice of Motion for a Review by said statutory three-judge court of said order and for a stay of execution thereof pending such review; and

(10) It further appearing that said Motion for Review came on for hearing on the 10th day of September, 1947 and having been denied and the application for a stay of execution thereon having been requested only in the event the application for review by said three-judge Court be granted, said stay of execution fell with the denial of the application for review; and that a formal order was made and signed by the undersigned on September 10, 1947, entitled "Order Denying Application for Review by Three Judge Court Pursuant to Title 28, Section 792, U. S. C. A." a true and correct copy of which is for convenience, attached hereto, marked Exhibit "B," the findings and conclusions therein are incorporated herein by reference with the same force and effect as though the same were herein set forth in full; and

(11) It further appearing that the bulk of the litigation thus far has had to do with some of the legal and preliminary phases only thereof and that the principal factual and legal matters which may arise in or in conjunction therewith remain to be heard, and there is also to be determined the various issues raised by the respective

cross-claims and interventions, and that the litigation is presently continuing, and unless the fees and expenses heretofore allowed be paid, the plaintiffs may be deprived of their rights to pursue the litigation to an ultimate judgment on the merits; and

(12) It further appearing that the assertion of the rights and claims by the plaintiffs did require and does require that they and counsel take an active part in the litigation and the incurring of enormous expense for the preparation of pleadings (which in this case have been voluminous), multitudinous court appearances, for the preparation and printing of records and briefs on appeal, and other incidents to litigation; that it presently appears that the within action was commenced and is maintained by the plaintiffs in good faith for the avowed purpose of protecting and preserving the rights, interests, assets and properties in said association of themselves and others similarly situated, and that due process of law for ultimate justice requires a trial and determination on the legal merits, or both legal and factual if the issues are not disposed of on the legal merits alone, and that in view of the whole record and files herein it would amount to a denial of due process to compel plaintiffs to pay the expenses and counsel fees heretofore allowed or to compel plaintiffs and counsel to await the final determination of the issues of said litigation for the payment of said fees and expenses; and

(13) It further appearing that as found by the Supreme Court of the United States in their opinion filed

on June 23, 1947—(*Ex Parte* Fahey, 133 Miscellaneous, October Term, 1946), “an allowance of Fifty Thousand Dollars (\$50,000.00) will hardly destroy a Twenty Six Million Dollar (\$26,000,000.00) Association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants’ grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs”.; and said Court therein denied said petition; and

(14) It further appearing that on September 10, 1947 the appellant A. V. Ammann filed a notice of appeal wherein the order and judgment of this Court for an interim partial allowance of attorneys fees and expenses to March 1, 1947 for the plaintiffs, was appealed to the Ninth Circuit Court of Appeals and immediately thereafter the Motion on which this order is based was presented to the Court.

Now Therefore, It Is Hereby Ordered, Adjudged And Decreed as follows:

FIRST: The application for stay of execution as to that part of the order and judgment allowing the sum of Fifteen Thousand Five Hundred Thirty and 29/100 (\$15,530.29) Dollars, as expenses incurred for the period up to March 1st, 1947, by the plaintiffs, the Shareholders Members Protective Committee, is unconditionally denied.

SECOND: The application for stay of execution as to that part of the order and judgment allowing the sum of One Thousand Five Hundred Thirty Four and 77/100 (\$1534.77) Dollars as expenses incurred for the period up to March 1, 1947, by the firm of Westover and Smith, attorneys for the plaintiffs, is unconditionally denied;

THIRD: The application for stay of execution as to that part of the order allowing the sum of Fifty Thousand (\$50,000.00) Dollars as an interim partial allowance on account of attorneys fees for services rendered prior to March 1, 1947, to the firm of Westover and Smith, as attorneys for the plaintiffs, Shareholder Members Protective Committee, is denied upon condition that the said firm of Westover and Smith file with the Clerk of this Court a Surety Bond in a form approved by this Court, conditioned that the said firm will obey any final judgment as to the disposition of the said sum of Fifty Thousand Dollars (\$50,000.00), paid pursuant to the order of this Court, and upon the filing of said bond as approved, the Clerk of this Court is ordered and directed to pay to the firm of Westover and Smith from the funds on deposit in the registry of this Court the sum of Fifty Thousand Dollars (\$50,000.00).

FOURTH: Pursuant to stipulations entered into in open Court, and entered by the Clerk in the minutes of this Court, by and between James M. Carter, United States Attorney, by Ronald Walker, Assistant United States Attorney, and by Ray E. Daugherty, Associate General Counsel for the Home Loan Bank Board on the one hand,

and Wyckoff Westover, Esquire, of the firm of Westover and Smith, on the other hand;

It Is Hereby Ordered that the Clerk of said Court make such payments to the said firm of Westover and Smith of the said sum of Fifty Thousand Dollars (\$50,000.00) and to plaintiffs and said attorneys of the said sum of Seventeen Thousand Sixty-five and 06/100 Dollars (\$17,065.06), only upon the occurring of either of the following events:

1. The expiration of 10 days from the date of the signature of this Order without the filing with the Clerk of this Court of notice that appellant has applied to the Ninth Circuit Court of Appeals, or to a Justice thereof, for a stay of Execution of said order; or

2. If such notice be so filed within said 10 days, then the filing with the Clerk of this Court of a Notice from the Ninth Circuit Court of Appeals, or from a Justice thereof, that application for a stay of execution made to said tribunal, or a Justice thereof, by said appellant, has been denied.

Dated at Los Angeles, California, this 30th day of September, 1947.

s/s PEIRSON M. HALL,

PEIRSON M. HALL, *Judge.*

EXHIBIT "B" OF EXHIBIT "B."

In the District Court of the United States, in and for the Southern District of California, Central Division.

Paul Mallonee, C. H. Newhouse and Winnie Bucklin, Individually, and as Representatives of a Class, suing for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, an Association organized and existing under and by virtue of the laws of the United States of America, Plaintiffs, v. John H. Fahey, Individually, John H. Fahey as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, individually and A. V. Ammann, as the purported Conservator for the Long Beach Federal Savings and Loan Association, The Long Beach Federal Savings and Loan Association, Title Service Company, sued herein as John Doe One (Cross-Claimant in Interpleader), R. H. Wallis, sued herein as John Doe Two (Cross-Claimant in Interpleader), *et al.*, Defendants. No. 5421-PH.

ORDER DENYING APPLICATION FOR REVIEW BY THREE
JUDGE COURT PURSUANT TO TITLE 28, SECTION 792
U. S. C. A.

On this 10th day of September, 1947, at the hour of 10:00 o'clock a. m., before the undersigned United States District Judge, and pursuant to notice theretofore given in accordance with the terms of an order of court, the application of the defendant A. V. Ammann, as conservator of the Long Beach Federal Savings and Loan Association for review by the three judge court, heretofore convened in the above-entitled action and "findings of fact, conclusions of law and order for interim partial allowance on

account of expenses and attorneys' fees incurred by the plaintiffs, the shareholders protective committee, prior to March, 1947," made and entered in the above-entitled matter on the 2nd day of September, 1947, and for a stay of execution thereon in connection with and pending such review, both having come on for hearing on the above date and hour; and Westover & Smith appearing as attorneys for said plaintiffs, H. O. Wallace appearing as attorney for cross-claimant in interpleader, Title Service Company, Charles K. Chapman appearing as attorney for Long Beach Federal Savings and Loan Association, defendant, third party plaintiff and cross-claimant, Raymond Tremaine for cross-claimant in interpleader and defendant Robert H. Wallis, and James M. Carter, United States Attorney, and Ronald R. Walker, Assistant United States Attorney, appearing as attorneys for said defendant A. V. Ammann, as well as Ray E. Dougherty, associate general counsel Home Loan Bank Board, appearing specially; and

It appearing to the Court that the three judge statutory court, which was convened and sat in this matter on July 15 and 16, 1946, under Title 28, Section 380(a), was limited to the determination as to whether or not an interlocutory or permanent injunction suspending or restraining the enforcement, operation or execution of, or setting aside in whole or in part an act of Congress, to wit, portions of the Home Owners Loan Act of 1933 as amended, upon the ground that such act or any part thereof was repugnant to the Constitution of the United States; and

It further appearing that said Court rendered the decision granting the injunction prayed for in the said matter on the ground that Section 5(d) of said Act was re-

pugnant to the Constitution of the United States, and made and entered its judgment accordingly on the 30th day of September, 1946; and

It further appearing that thereafter an appeal was taken from said judgment of the said three judge Court directly to the Supreme Court of the United States which, on June 23, 1947, rendered its opinion holding said Section 5(d) not to be repugnant to the Constitution of the United States and ordering the judgment of said three judge court reversed; and

It further appearing pursuant to said opinion that the mandate in compliance therewith was spread in the above-entitled court on the 19th day of August 1947; and

It further appearing that the power of said three judge court was limited to a consideration of the question of constitutionality and that upon the reversal of the judgment of said three judge court by the Supreme Court and spreading of the mandate on the 19th day of August, 1947, as aforesaid terminated any and all power and jurisdiction of said three judge court; and

It further appearing that the final hearing by the said three judge or statutory court was had on July 15 and 16, 1947, and

It further appearing that the hearing upon which the said findings of fact, etc., hereinabove referred to were made, was held by the undersigned on April 7, 1947; and

It further appearing that subsequent thereto and, to wit, on April 12, 1947, the undersigned received telegraphic notice that the Supreme Court, on a petition theretofore filed by and on behalf of John H. Fahey and A. V. Ammann, prohibited, enjoined and restrained the undersigned from taking any further proceedings in connection with

the petitions for allowance of attorneys' fees and expenses theretofore filed on behalf of various parties, including the said Westover & Smith and the said plaintiffs, which telegraphic notice was subsequently followed by formal notification from the clerk of the Supreme Court to the undersigned judge; and

It further appearing that pursuant to said order of prohibition, injunction and restraint, the undersigned judge took no action in connection with the matters covered by said order of prohibition, injunction and restraint until after the decision of the Supreme Court on the 23rd day of June, 1947, denying said petition of said John H. Fahey and A. V. Ammann for a permanent order of prohibition, enjoinder and restraint and until after the spreading and filing of the mandate from the Supreme Court hereinabove referred to on August 19, 1947.

From the foregoing, it is hereby concluded by the undersigned that on the 2nd day of September, 1947, on the date of signing, making and entering the said findings of fact, etc., the said three judge court was not in existence and is not now, and that the final hearing as contemplated by Section 792 of Title 28 was had on July 15 and 16, 1946.

Now, therefore, it is hereby ordered that said application for review to the three judge court be, and it is hereby denied; and it is further hereby ordered that inasmuch as the application for stay of execution was requested only in the event the application for review to said three judge

court was granted, that said stay of execution falls with the denial of the application for review to the three judge court.

Dated: At Los Angeles, California this 10th day of September, 1947.

s/s PIERSON M. HALL

PIERSON M. HALL

Judge of the District Court of the United States.

Approved as to form:

CHARLES E. CHAPMAN

Attorney for Long Beach Federal Savings and Loan
Association.

THOMAS AND WALLACE

By -----

H. C. WALLACE

Attorney for Title Service Company

RAYMOND TREMAINE

Attorney for Robert H. Wallis

O'MERVENT AND MYERS

By -----

PIERCE WORKS

RICHARD FITZPATRICK

Attorneys for Federal Home Loan Bank of Los
Angeles

Service of the foregoing order acknowledged this
day of September 1947 at PM

Assistant U. S. Attorney

Attorney for defendant Ammann.

Judgment entered Sep. 30 1947. Docketed Sept. 30
1947 C. O. Book 46, Page 25.

EDMUND L. SMITH,

Clerk,

By J. M. HORN

Deputy.

No. 12,591

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN H. FAHEY, et al.,

Appellants,

vs.

O'MELVENY & MYERS, W. I. GILBERT,
JR., and RICHARD FITZPATRICK,

Appellees,

and

FEDERAL HOME LOAN BANK OF SAN
FRANCISCO,

Appellant,

vs.

O'MELVENY & MYERS, W. I. GILBERT,
JR., and RICHARD FITZPATRICK,

Appellees.

On Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR APPELLANTS.

FILED

OCT 9 1951

PAUL P. O'BRIEN
CLERK

HOLMES BALDRIDGE,
Assistant Attorney General,

EDWARD H. HICKEY,

DONALD B. MACGUINEAS,
Attorneys, Department of Justice,

VERNE DUSENBERY,

PHILIP H. ANGELL,

SYLVESTER HOFFMANN,

Attorneys for Appellants.

MOSE SILVERMAN,
Home Loan Bank Board,

ROBERT M. ADAMS, JR.,
Of Counsel.

Subject Index

	Page
Opinion and order of the District Court	1
Jurisdictional statement	2
Statement of the case	5
Dissolution of the Los Angeles Bank	5
The Los Angeles action	5
The Mallonee action	6
Out of state service on non-resident appellants.....	8
The source of the deposits in the registry of the court	9
Borrower intervention proceedings	9
The Wallis "interpleader"	10
San Francisco bank impound	10
The Turner "interpleader"	11
Insurance premium "interpleaders"	12
The order on appeal	13
The present status of the actions	14
Questions presented	15
Specification of errors	17
Summary of argument	19
Statutes and administrative orders involved	21
Argument	22
Introduction	22

I.

The order appealed from cannot be sustained for the reason that the action in which it is entered fails to present a claim for relief within the jurisdiction of the federal courts	23
(1) Neither the former shareholders of the Los Angeles Bank nor the bank itself have standing to maintain the Los Angeles action	23
(a) Plaintiff members of the former Los Angeles Bank have no standing to maintain this action.....	24

	Page
(b) The former Los Angeles Bank has no standing to maintain this action	30
(2) The administrative action complained of is not subject to judicial review	35
(3) The fact that the administrative orders complained of were issued without notice, hearing or formal findings, does not create a justiciable issue.....	39
(4) The Home Loan Bank board and its members are indispensable parties to the maintenance of the action, and valid services on the board or its members were not had	43
(5) The action is an unconsented suit against the United States	48

II.

Assuming, contrary to fact and law, that plaintiffs' pleadings state a claim for relief within the court's jurisdiction, the court erred in awarding attorneys' fees to appellees and imposing the burden of their payment upon other parties to the litigation	51
(1) In the absence of contract or statute expressly providing for the recovery of attorneys' fees, attorneys employed in litigation must look for their compensation to the party who employed them, and are ordinarily not entitled to recover their fees from other litigants	51
(2) An adverse party may not recover attorneys' fees unless the case clearly falls within the limited and well defined exceptions to the general rule and this case does not fall within any of them.....	54

III.

Assuming, contrary to fact and law, that plaintiffs' pleadings state a claim for relief within the court's jurisdiction and that the court is authorized to award attorneys' fees, the court erred in directing payment of such fees out of monies on deposit in the registry of the court.....	68
Conclusion	77

Table of Authorities Cited

Cases	Pages
Aetna Life Ins. Co. v. Haworth, 300 U.S. 227.....	45
Aetna Life Ins. Co. v. Haworth, 300 U.S. 227.....	45
Alabama Power Co. v. Ickes, 302 U.S. 464.....	24
American Dredging Co. v. Cochrane, 190 F. (2d) 106.....	49
American Water Works & Electric Co. v. Allegheny T. Co., 43 Fed. Supp. 102 (D.C. Pa.) (aff'd 125 F. (2d) 561	75
Anderson v. Great Republic L. Ins. Co., 41 C.A. (2d) 181, 106 P. (2d) 75	62, 63
Arndt v. Griggs, 134 U.S. 316	57
Atlantic Trust Co. v. Chapman, 208 U.S. 360.....	56
Barnes v. Newcomb, 89 N.Y. 108	62, 63, 64
Berndorf v. Thorpe, 126 Okla. 157, 259 Pac. 242.....	52
Biggins v. Oltmer Iron Works (7 C.A.), 154 F. (2d) 214	4
Blank v. Bitken, 135 F. (2d) 962.....	47
Board of Governors of the Federal Reserve System v. Agnew, 329 U.S. 441 (1947)	36
Booth v. Clark, 17 How. 322	56
Borden Farm Prod. Co. v. Baldwin, 293 U.S. 194.....	40
Buford v. Tobacco Growers' Co-op Ass'n (4 C.A.), 42 F. (2d) 791	61
Buttfield v. Strahan, 192 U.S. 470	40
Caminetti v. State Mut. Life Ins. Co., 52 C.A. (2d) 326, 126 P. (2d) 169	62
Century Ins. Co. v. First Nat. Bank (5 C.A.), 133 F. (2d) 789	75
Chabot & Richard Co. v. Chabot, 109 Me. 403, 84 A. 892...	67
Chicago & S. Airlines v. Waterman S.S. Corp., 333 U.S. 103	36, 38
Chicago, B. & Q. R. Co. v. Babcock, 204 U.S. 585.....	37
Colley v. Wolcott (8 C.A.), 187 Fed. 595.....	4
Commissioners of Laramie County v. Commissioners of Al- bany County, 92 U.S. 307	26, 40
Commonwealth v. Sisson, 189 Mass. 247, 75 N.E. 619.....	40
Continental Trust Co. v. Corbin, 80 Fed. Supp. 394.....	76
Crump v. Ramish (9 C.A.), 86 F. (2d) 362.....	60, 61
Culhane v. Anderson (8 C.A.), 17 F. (2d) 559.....	56

	Pages
Daggs v. Klein, 169 F. (2d) 174.....	44
Dakota Central Tel. Co. v. South Dakota, 250 U.S. 163.....	39
Dan Cohen Realty Co. v. National Savings & Trust Co., 125 F. (2d) 288	46, 47
Department of Agriculture v. Remund, 330 U.S. 539.....	49
Devine v. Griffenhagen, 31 Fed. Supp. 624.....	47
Doddridge County Oil & Gas Co. v. Smith (4 C.A.), 173 Fed. 386	53
D'Oench Duhme & Co., Inc. v. Federal Deposit Insurance Corp., 315 U.S. 447	68
Dubil v. Rayford Camp & Co., 184 F. (2d) 899 (9 C.A.)..	23
Edward Hines Yellow Pines Trustees v. United States, 263 U.S. 143	26
Eggert v. Pacific States Savings & Loan Company, 53 C.A. (2d) 552, 127 P. (2d) 999	65
Esarey v. Pierson, 84 Ind. App. 109, 141 N.E. 87.....	64
Ex parte Fahey, 332 U.S. 258.....	62
Faxon v. All Persons, 166 Cal. 707, 137 Pac. 919.....	58
Federal Deposit Ins. Corp. v. Citizens' State Bank, 130 F. (2d) 102	68
Federal Land Bank v. Bismarek Lumber Co., 314 U.S. 95..	31, 33, 42
Federal Land Bank v. Gaines, 290 U.S. 247.....	31, 42
Federal Land Bank v. Priddy, 295 U.S. 229.....	33
Flanders v. Tweed, 82 U.S. 450.....	52
Forgay v. Conrad, 6 How. 201	4
Forrester v. Boston & M. Consol. & Silver Min. Co., 29 Mont. 397, 74 Pac. 1088, 76 Pac. 211.....	60
Gassert v. Strong, 38 Mont. 18, 98 Pac. 497.....	57
Gerber v. Fruchter, 147 F. (2d) 120.....	47
Gold Dust Corporation v. Hoffenberg (2 C.A.), 87 F. (2d) 451	52
Goodwin v. Castleton, 19 Wash. (2d) 748, 144 P. (2d) 725	61
Greene County Nat. F. L. Ass'n v. Federal Land Bank, 152 F. (2d) 215	42, 67
Groves v. Sentell, 153 U.S. 465	75
Guardian Life Insurance Co. v. Rosenbaum (3 C.A.), 280 Fed. 861	75

TABLE OF AUTHORITIES CITED

v

	Pages
Guardian Trust Co. v. Kansas City Southern Ry. Co. (8 C.A.), 28 F. (2d) 233	55
Gulf Pipe Line v. Warren, 45 S.W. (2d) 719 (Tex. Civ. App. 1931)	75
H. F. Wilcox Oil and Gas Co. v. State, 162 Okla. 89, 19 P. (2d) 347	40
Hanover National Bank v. Moyses, 186 U.S. 181.....	55
Harbison v. First Presbyterian Society of Hartford, 46 Conn. 528, 33 Am. Rep. 34	67
Hauenstein v. Lynham, 100 U.S. 483.....	58
Hempstead v. Meadville Theological School, 286 Pac. 493, 134 Atl. 103	52, 60
Hobbs v. McLean, 117 U.S. 567.....	58, 60
Hooker, Corser & Mitchell Co. v. Hooker, 88 Vt. 335, 92 A. 443	67
Hunter v. Pittsburgh, 207 U.S. 161.....	25, 34, 40
In re Levitt, 302 U.S. 633.....	30
In re Marre's Estate, 18 C. (2d) 191, 114 P. (2d) 591.....	52
Inland Waterways Corp. v. Young, 309 U.S. 517.....	68
Isbrandtsen-Moller Co. v. United States, 300 U.S. 139.....	39
Jesse v. Four-Wheel Drive Auto Co., 177 Wis. 627, 189 N.W. 276	67
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123	40, 41
Kashishke v. Baker (10 C.A.), 144 F. (2d) 384.....	4
Kern v. Genter, 176 Ore. 479, 159 P. (2d) 190.....	52
Kleinschmidt v. Kleinschmidt Laboratories, 89 Fed. Supp. 869	47
Knox National F. L. Association v. Phillips, 300 U.S. 194	4, 42
Krug v. Santa Fe Pacific Rd. Co., 329 U.S. 591 (1947)....	36
Ladew v. Tennessee Copper Co., 179 Fed. 245.....	46
Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682	49, 50
Lawyers' Advertising Co. v. Cons. Ry. Lighting & Refr. Co., 187 N.Y. 395, 80 N.E. 199.....	67
Leary v. United States, 257 Fed. 246 (4 C.A.).....	59
Lehigh Valley R. Co. v. United States, 188 Fed. 879.....	43, 73

	Pages
Local Loan Co. v. Hunt, 292 U.S. 234.....	55
Louisiana v. McAdoo, 234 U.S. 627.....	38
Marks v. Leo Feist Inc. (2 C.A.), 8 F. (2d) 460.....	52
Marshall v. Pletz, 317 U.S. 383.....	38
Martin v. Wolfson, 218 Minn. 557, 16 N.W. (2d) 884.....	40
Massachusetts v. Mellon, 262 U.S. 447	24
Maya Corporation v. Smith, 32 F. (2d) 350	46, 47
McDaniel v. McElvy, 91 Fla. 770, 108 So. 820.....	57
McDonough v. Goodcell, 13 C. (2d) 741, 91 P. (2d) 1035	40
McGuinness v. Hargiss, 56 Wash. 162, 105 Pac. 233.....	58
Merrick v. Bonness, 66 Minn. 135, 68 N.W. 850.....	60
Miles City v. State Board of Health, 39 Mont. 405, 102 Pac. 696	40
Mt. Pleasant v. Beckwith, 100 U.S. 514.....	25, 40
Mutual Ben. Health & Accident Ass'n v. Moyer (9 C.A.), 94 F. (2d) 906	53
National Bank v. Whitney, 103 U.S. 99, 103 U.S. 104.....	59
Oelrichs v. Spain, 82 U.S. 211	51, 52
O'Hara v. Oakland County (6 C.A.), 136 F. (2d) 152....	60, 61
O'Morrow v. Board, 27 C. (2d) 794, 167 P. (2d) 483.....	52
Orange Theatre Corp. v. Ray Herstz Amusement Corp., 139 F. (2d) 871	47
Pacific States Box and Basket Co. v. White, 296 U.S. 176	40
Patterson v. Lamb, 329 U.S. 539 (1947).....	36
Pawhuska v. Pawhuska Oil & Gas Co., 250 U.S. 394.....	40
Pennoyer v. Neff, 95 U.S. 714	57
Peoples Bank v. Federal Res. Bk. of S. F., 58 Fed. Supp. 25	28, 42
Perkins v. Lukens Steel Co., 310 U.S. 113.....	24
Pickrel v. Merion (6 C.A.), 66 N.E. (2d) 273.....	62
Pittman v. Home Owners' Loan Corporation, 308 U.S. 21	33
Porter v. Sabin, 149 U.S. 473	56
Red River Broadcasting Co. v. F.C.C., 98 F. (2d) 282.....	38
Riddle v. Hudgins, 58 Fed. 490	59
Rubert Hernanos Inc. v. People (1 C.A.), 118 F. (2d) 752	4
Rude v. Buchhalter, 286 U.S. 451.....	52

TABLE OF AUTHORITIES CITED

vii

	Pages
School District No. 3 v. Callahan, 237 Wis. 560, 297 N.W. 407	40
Smith v. Kansas City Title and Trust Co., 255 U.S. 180....	31
Sprague v. Titonic Bank, 307 U.S. 161.....	49, 60
Sprunt & Son v. United States, 281 U.S. 249.....	26
State v. City of Bremerton, 8 Wash. (2d) 93, 111 P. (2d) 612	52
State Airlines v. Civil Aeronautics Board, 174 F. (2d) 510..	50
Stillman v. Hart (C.A. Tex.), 126 Fed. 359.....	4
Switchmen's Union v. National Mediation Board, 320 U.S. 297	38
Tagg Bros. & Moorhead v. United States, 280 U.S. 420.....	38
Tennessee Electric Power Co. v. TVA, 306 U.S. 118.....	24
Trenton v. New Jersey, 262 U.S. 182.....	40
Trustee v. Greenough, 105 U.S. 527.....	4, 60, 61
Tuttle v. Claflin (2 C.A.), 88 Fed. 122.....	4
Uffelman v. Boillin, 19 Tenn. App. 1, 82 S.W. (2d) 545.....	61
U.S. v. Bush & Co., 310 U.S. 371.....	36
United States v. Corrick, 298 U.S. 435.....	43, 73
United States v. Merchants & Manufacturers Traffic Assn., 242 U.S. 178	26
United States v. Ruzicka, 329 U.S. 287 (1946).....	36
United States v. Vacuum Oil Co., 158 Fed. 536.....	43
Van Sender v. Wilkinson (C.A. D.C.), 76 F. (2d) 151.....	52
Vicksburg, S. & P. Ry. Co. v. Nattin, 54 F. (2d) 712 (D.C.)	23
Watson v. Johnson, 174 Wash. 12, 24 P. (2d) 592.....	64
Wilhelm v. Consolidated Oil Corporation, 84 F. (2d) 739...	47
Williams v. Fanning, 332 U.S. 490.....	43, 44, 45
Williamsport Wire Rope Co. v. United States, 277 U.S. 551	36
Winslow v. Harold G. Ferguson Corporation, 25 Cal. (2d) 274, 148 P. (2d) 86.....	61
Zumsteg v. Aetna Casualty & Surety Co. (8 C.A.), 31 F. (2d) 65	52

Statutes	Pages
Administrative Procedure Act:	
Section 10	35, 37
Section 10(e)	50
6 Edward I. C. 2 and 23 Henry VIII.....	53
Federal Home Loan Bank Act, as amended (12 U.S.C. 1421) :	
Section 3	25, 28, 32, 37
Section 4	26
Section 4(a)	32
Section 4(b)	27
Section 5	26
Section 6(a)	27
Section 6(c)	27
Section 6(h)	27
Section 6(i)	27, 32
Section 6(j)	27
Section 6(l)	27
Section 7	32, 44
Section 11(b)	46
Section 12	33, 45
Section 17	33
Section 25	28, 32, 33, 37
Section 26	32, 33, 36, 37, 38
Home Owners Loan Act (12 U.S.C. 1464) :	
Section 5	7, 26
Section 5(f)	29
Judicial Code, Chapter 123 (28 U.S.C., Sections 1911-1929) ..	53
Revised Statutes (1878), Section 983.....	53
5 U.S.C. 1001 etc.	35
5 U.S.C. 1009	37
12 U.S.C. 221	31
12 U.S.C. 641	31
12 U.S.C. 1421	21
12 U.S.C. 1464	7
12 U.S.C. 1464(f)	29

TABLE OF AUTHORITIES CITED

ix

	Pages
12 U.S.C. 1726(a)	12
28 U.S.C., Section 41 (26) (now Sections 1335, 1397, 2361) ..	8
28 U.S.C., Section 118 (now Section 1655)	8
28 U.S.C. 1291	4
28 U.S.C. 1331, 1332	3
28 U.S.C. 1655	15, 17, 43, 46
28 U.S.C. 1923	53
28 U.S.C. 2361	15

Rules

Federal Rules of Civil Procedure, Rule 12(b)	47
--	----

Texts

6 Am. Jur., page 569	55
14 Am. Jur., page 46, et seq.	49
44 Am. Jur., page 83	58
49 A.L.R. 1190	49
107 A.L.R. 749	49
Attorney General's Manual, Administrative Procedure Act, pages 93-94, 96	36, 50
1 C.J.S., page 944	57
19 C.J.S., page 256	49
48 C.J.S., page 105	75
2 Moore's Federal Practice, page 2260, 2d Ed.	47

No. 12,591

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN H. FAHEY, et al.,

Appellants,

VS.

O'MELVENY & MYERS, W. I. GILBERT,
JR., and RICHARD FITZPATRICK,

Appellees,

and

FEDERAL HOME LOAN BANK OF SAN
FRANCISCO,

Appellant,

VS.

O'MELVENY & MYERS, W. I. GILBERT,
JR., and RICHARD FITZPATRICK,

Appellees.

On Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR APPELLANTS.

OPINION AND ORDER OF THE DISTRICT COURT.

The oral opinion of the District Court appears at
R. 833 and the order appealed from at R. 288.

JURISDICTIONAL STATEMENT.

This is an appeal by the Home Loan Bank Board, the Federal Home Loan Bank of San Francisco, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann, and George K. Bramley, individually and in their respective representative and official capacities, if any, and the Federal Savings and Loan Insurance Corporation, from an order dated June 19, 1950, directing the Clerk of the Court to pay forthwith out of funds on deposit in the registry of the Court, sums aggregating \$75,000.00 as interim allowances of fees to attorneys for plaintiffs in action No. 5678. The order was issued in action No. 5678 which the District Court had consolidated with action No. 5421 into one action (R. 291).

Action No. 5678, hereinafter referred to as the "Los Angeles Action," was instituted by the former Federal Home Loan Bank of Los Angeles and six of its member savings and loan institutions to recover assets transferred by three orders dated March 29, 1946, of the Federal Home Loan Bank Administration, which, among other things, dissolved the Federal Home Loan Bank of Los Angeles and transferred its assets and liabilities to the Federal Home Loan Bank of Portland, renamed the Federal Home Loan Bank of San Francisco, and to declare void said administrative orders. Jurisdiction was based upon allegations that the action arose under the Constitution and laws of the United States and that the

amount in controversy exceeded the sum of \$45,-000,000.00¹ (12511 R. 9466).

The other consolidated action, No. 5421, hereinafter referred to as the "Mallonee Action," was brought by shareholders of the Long Beach Federal Savings and Loan Association, suing derivatively, with a substantially identical cross-claim by the Association, to oust a conservator appointed on May 20, 1946 for that association by the Federal Home Loan Bank Administration, and for other relief. The Court below is alleged in both the complaint (12511 R. 2961-2962 and cross-claim (12511 R. 3189, 3191) to have jurisdiction by reason of the presence of substantial federal questions and diversity of citizenship. 28 U.S.C. 1331, 1332. It is further alleged that the amount involved is approximately \$70,000,-000.00 (12511 R. 2962, 3190).

The order from which this appeal is taken was entered in Judgment Book 66 at page 524-545 of

¹There is now pending in this Court an appeal, No. 12511, from a preliminary injunction, issued in the consolidated action, enjoining the Home Loan Bank Board from holding an administrative hearing on its order to show cause why the Board should not take administrative action against the Long Beach Federal Savings and Loan Association because of its violation of regulations (12511 R. 8242n). The injunction was based in part upon the Court's finding that its issuance was necessary to protect the Court's jurisdiction to determine the validity of the March 29, 1946 orders (12511 R. 8298). That appeal challenged *inter alia* the jurisdiction of the District Court in the consolidated actions insofar as they relate to the orders of March 29, 1946. Some of the questions involved in that appeal are necessarily present in this appeal and this Court has, therefore, entered its order authorizing reference to the printed record on appeal in No. 12511 (R. 875).

References herein to "12511 R." will be to the printed record in appeal No. 12511. References to "R." will be to the printed record in the instant appeal, No. 12591.

the records of that Court on June 19, 1950 (R. 288, 312). Notice of appeal was filed by appellants on June 20, 1950 (R. 322-323).

This Court has jurisdiction of this appeal under Section 1291 of Title 28 U.S.C.

The order is a "final decision" and therefore appealable. An order to be final need not dispose of the entire controversy; a final disposition of part of a controversy is appealable.

Biggins v. Oltmer Iron Works (7 C.A.);

154 F. (2d) 214;

Kashishke v. Baker (10 C.A.), 144 F. (2d) 384;

Rubert Hernanos Inc. v. People (1 C.A.)

118 F. (2d) 752;

Forgay v. Conrad, 6 How. 201.

Knox National F. L. Association v. Phillips,
300 U.S. 194, 197.

An order allowing and directing payment of attorneys' fees out of funds in court, entered prior to complete determination of the litigation, is appealable.

Trustees v. Greenough, 105 U.S. 527;

Tuttle v. Claflin (2 C.A.) 88 Fed. 122;

Colley v. Wolcott (8 C.A.) 187 Fed. 595;

An order finally directing the payment of costs out of a fund in Court is appealable.

Stillman v. Hart (C. A. Tex.), 126 Fed. 359.

STATEMENT OF THE CASE.

Dissolution of the Los Angeles Bank.

On March 29, 1946 the Federal Home Loan Bank Administration, which by Executive Order No. 9070 exercised the powers of the Federal Home Loan Bank Board (Sec. 17, App. *infra*, p. xix), issued and carried into effect three orders Nos. 5082, 5083 and 5084 (App. *infra*, p. xxi), pursuant to Sections 3, 25 and 26 of the Federal Home Loan Bank Act (App. *infra*, pp. i, xx), readjusting the Eleventh Federal Home Loan Bank District so as to include the territory of the then Twelfth District, dissolving the Federal Home Loan Bank of Los Angeles which had served the Twelfth District, transferring its assets and liabilities to the Federal Home Loan Bank of Portland which had served the Eleventh District, and reconstituting the latter as the Federal Home Loan Bank of San Francisco with headquarters at San Francisco, California. These orders expressly determined in substantially the words of Section 26 of the Act that the "efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action."

The Los Angeles Action.

On August 22, 1946 there was filed in the United States District Court for the Southern District of California an action, the Los Angeles action, in which the Federal Home Loan Bank of Los Angeles and six savings and loan associations, formerly members thereof, were named as plaintiffs, and the "Federal

Home Loan Bank of Portland, sometimes known and referred to as Federal Home Loan Bank of San Francisco," together with John H. Fahey individually and as "Chairman of the Federal Home Loan Bank Board and purportedly serving as Federal Home Loan Bank Commissioner" and numerous does, were named as defendants² (12511 R. 9465). The complaint alleged that the three orders were issued without notice or hearing, that the acts done pursuant thereto were "wholly punitive and disciplinary" and were illegal, invalid and void (12511 R. 9470, 9475, 9480); prayed that they be declared and adjudged void and of no effect; that "any and all clouds and purported liens thereby created" upon the assets of the plaintiffs be removed; that the possession of said assets be returned to the plaintiffs; and that the Portland Bank be required to account to the plaintiffs (12511 R. 9493-9495).

The Mallonee Action.

Prior to the institution of the Los Angeles action and on May 27, 1946 there had been filed in the same court an action No. 5421, the Mallonee action, by three shareholders suing derivatively on behalf of the Long Beach Federal Savings & Loan Association, a Federal savings and loan association organized and

²When by Reorganization Plan No. 3 of 1947, the Home Loan Bank Board succeeded to the powers and functions of the Federal Home Loan Bank Administration, the Home Loan Bank Board and its members were substituted as parties defendant in both actions for John H. Fahey, as Federal Home Loan Bank Commissioner (12511 R. 2546, 9532). Subsequently, and on November 19, 1950, Mr. Fahey died.

existing pursuant to Section 5 of the Home Owners Loan Act (12 U.S.C. 1464). That action, brought against John H. Fahey individually and as Federal Home Loan Bank Commissioner, and others, and based on the grounds that the charges of mismanagement made against the Association's officers were false and known by Fahey to be false, sought to oust A. V. Ammann, appointed by the Federal Home Loan Bank Administration as Conservator for the Association. After removal of the Conservator on January 24, 1948, the action sought an accounting and damages.

In the Mallonee action the plaintiffs and the Long Beach Association, together with the cross-claimants collaborating with them, sought and obtained an injunction against the holding of an administrative hearing (12511 R. 372), provided for under regulations of the Federal Home Loan Administration, at which hearing the propriety of the Conservator's appointment could be contested (24 CFR 148.2). In that action also, on motion of the plaintiffs and the Long Beach Association, the Court enjoined the prosecution of a suit filed in the United States District Court for the Northern District of California by ten Northern California members of the San Francisco Bank "suing on behalf of all said similarly situated members and stockholders" (12511 R. 8362). The object of that suit was an injunction to restrain the San Francisco Bank and its directors from executing a stipulation proposed to be entered

in the consolidated action under which the Los Angeles Bank was to be reestablished (12511 R. 4641, 4658).

Allegations of the invalidity of the March 29, 1946 orders were made in the complaint (12511 R. 3070-3074), as they were in a cross-claim filed by the Long Beach Association (12511 R. 3281), in a third-party complaint of the Association (12511 R. 287), and in a third-party cross-claim of the Los Angeles Bank (12511 R. 564). These allegations in the various pleadings in the Mallonee action are substantially the same as those in the Los Angeles action and need not, therefore, be separately considered.

Out of State Service on Non-resident Appellants.

None of the appellants, except A. V. Ammann the Conservator and Federal Home Loan Bank of San Francisco, were served personally within the State of California in either action. Service of the complaints in the consolidated actions, designated as *in rem* actions for the return of property located in the State of California, was made in Washington, D. C., pursuant to orders for service on non-resident defendants under former Section 118, Title 28 U.S.C. (now Section 1655) (12511 R. 65-68, 4340, 5357, 9502-9510). Service of the so-called "cross-claims in interpleader" was made on non-resident defendants in Washington, D. C. purportedly pursuant to former Section 41 (26), Title 28 U.S.C. (Now Sections 1335, 1397, 2361) (12511 R. 78-80, 445-446).

The Source of the Deposits in the Registry of the Court.

The deposits in Court, out of which payment of fees was directed, arose from various interpleader proceedings in the Mallonee action, each of which was based on a presumption that the order appointing the Conservator was void *ab initio*, that every act performed by the Conservator in the management of the Association was a nullity and was therefore subject to collateral attack.

Borrower Intervention Proceedings.

Title Service Company, a corporation organized and operated by substantially the same persons who were and are officers and directors of the Long Beach Association and which was served as a John Doe defendant in the Mallonee action, filed so-called cross-claims in interpleader in that action alleging that it was trustee under some 8,000 trust deeds securing loans made by the Association with a remaining balance of over \$12,000,000.00, that it was faced with conflicting demands, one from the Conservator, requesting it to make reconveyance of title to borrowers on repayment of loans secured by the trust deeds, and the other by the Association directing it not to make such reconveyances, and praying that the Court adjudicate the rights of the adverse claimants. Thereafter borrowers desiring to obtain reconveyances of title on final repayment of loans were required by the Court to intervene in the Mallonee action and to deposit their final payment in the registry of the

Court. The Court orders authorizing the interventions directed the Conservator to deposit in Court all sums paid by the borrower intervenors during the conservatorship, after which the Court directed delivery of the reconveyances. At least 50 such intervention proceedings were conducted in the Mallonee action and \$1,641,037.96 of Long Beach Association funds was thus drawn into the registry of the Court (12511 R. 8287-8288).

The Wallis "Interpleader"

On June 12, 1946 one Wallis, a John Doe defendant in the Mallonee action, filed therein a "cross-claim in interpleader," depositing an unendorsed cashier's check for \$50,000 payable to himself. The cross-claim alleged that the check had been delivered to him by the Long Beach Association to be used by him for the payment of his and other legal fees and expenses in anticipated litigation with John H. Fahey; that the Association on the one hand and the Conservator on the other were making conflicting demands upon him as to the use of the check, and prayed that he be instructed by the Court as to his rights and duties with respect thereto (12511 R. 86-99).

San Francisco Bank Impound

In May, 1946 the Long Beach Association, acting through the Conservator, borrowed from the San Francisco Bank the sum of \$7,300,000.00 (later paid

down to \$6,300,000.00) and pledged as security therefor some \$12,000,000.00 of its notes and trust deeds and \$5,300,000.00 face value of government bonds. On motion made by the Long Beach Association in the Mallonee action the Court on March 13, 1948 entered an order (12511 R. 8399-8525) requiring the San Francisco Bank to deposit in the registry of the Court the notes of the Long Beach Association evidencing the \$6,300,000.00 loan together with the United States bonds in the sum of \$5,300,000.00 and the notes and trust deeds which had been pledged as collateral.

On motion of the Long Beach Association, the Court on March 26, 1948 entered an order releasing to the Association the notes and trust deeds then amounting to more than \$8,000,000.00 theretofore deposited in the Court's registry pursuant to its order of March 13, 1948, lifting the lien of the San Francisco Bank thereon, and transferring the lien to so much of the funds then in the registry of the Court under the borrower-intervenor proceedings as would make the difference between \$5,300,000.00 (the face value of the bonds in the registry) and \$6,324,098.35 (the amount of principal and interest due as of March 10, 1948 on the Association's notes to the San Francisco Bank) plus interest on \$6,300,000.00 from March 10, 1948 until paid (12511 R. 8526-8536).

The Turner "Interpleader"

On January 29, 1948 after the termination of the Long Beach Association conservatorship, one George

Turner, a John Doe defendant in the Mallonee action, filed a so-called "cross-claim in interpleader," alleging certain undefined conflicting claims to rentals due from him under a lease of real property from the Association. He deposited in the registry of the Court the sum of \$11,515.87, the amount of rentals then alleged due, and from time to time as additional rentals became due filed supplemental "interpleaders" depositing additional sums in the Court's registry (12511 R. 3461, 3872, 8138). At the date of the order appealed from the amount of rentals so "interpleaded" and drawn into the registry of the Court was \$18,503.52 (R. 306).

Insurance Premium "Interpleaders"

In April 1949 the Association, claiming conflicting demands by the Federal Savings and Loan Insurance Corporation on the one hand and the Association shareholders on the other, was permitted by the Court to "interplead" in the Mallonee action and deposit in the registry of the Court the sum of \$24,374.06, the amount of insurance premiums claimed by the insurance corporation, which was required by statute to insure the accounts of the Association (12 U.S.C. 1726(a)). As succeeding installments of insurance premiums fell due, the Association filed supplemental "interpleaders" in the Mallonee action depositing in the registry of the Court the amount of the premium installments. At the date of the entry of the order on appeal the amount of insurance premiums so "interpleaded" and drawn into the registry of the

Court was \$55,485.25 (12511 R. 6767, 6920, 6965; R. 306).

The Order on Appeal.

The order appealed from (R. 288-312) was issued pursuant to motion filed on January 5, 1949 by the plaintiffs in the Los Angeles action (12511 R. 5698-5700). The motion was based on the grounds that the Federal Home Loan Bank of Los Angeles had no funds with which to pay its attorneys "since all of its assets are in the possession of the Federal Home Loan Bank of Portland," and that the association plaintiffs "have a beneficial interest in the assets of Los Angeles Bank now in possession of said defendant Federal Home Loan Bank of Portland sufficient to entitle them, and each of them, to the payment out of said assets of the fees of their attorneys."

The order directed payment by the Clerk to Messrs. O'Melveny & Myers, and Richard FitzPatrick, attorneys for Los Angeles Bank and for five of the association plaintiffs, of attorneys' fees in the amount of \$67,500.00 for services theretofore rendered in the Los Angeles action; and to W. I. Gilbert, Jr.,³ attorney for the sixth association plaintiff, fees in the amount of \$7500.00 for services theretofore rendered in the consolidated actions. The order provided that the payment be made "out of funds and

³On September 12, 1949, pursuant to order (12511 R. 7191) W. I. Gilbert, Jr., Esq., was substituted for Messrs. O'Melveny & Myers and Richard FitzPatrick, Esq., as attorneys for the Wilmington Savings and Loan Association, one of the association plaintiffs in the Los Angeles Action. The Wilmington Association filed a separate motion for an attorney's fee (12511 R. 8909).

moneys heretofore deposited and now on deposit in the Registry of the Court in the above entitled consolidated actions” and that “the amounts ordered hereby paid generally from the funds in the Registry of the Court are not by the terms of this Order, imposed, allocated or assessed upon or against any specific party or parties, fund or funds, provided, however, that it is hereby determined and ordered that the amounts, or any part thereof, herein allowed and ordered paid from said funds shall never be allocated against or imposed upon funds or assets owned by or belonging to the Long Beach Federal Savings and Loan Association, or any of its shareholders, members or stockholders, either individually, or as an association, except as such association shall be required to bear as a member-shareholder only of a Federal Home Loan Bank. The intention being that the services for which fees are herein allowed are primarily for the benefit of said Los Angeles Bank and its association member-shareholders as distinguished from the Long Beach Association and other parties as separate entities or parties.” The order further provided “that Long Beach Association shall not at any time be required to deposit any additional money or property in Court in these consolidated actions upon or because of the payment of all or any portion of the sums herein ordered and directed to be paid.”

The Present Status of the Actions.

Answers to the complaints in both cases and to the various cross-claims in the Mallonee Action

have been filed by the appellants (12511 R. 4024, 4057, 5056, 5063, 5073, 5102, 9540). The answers placed in issue the material allegations of the complaints and cross-claims, denied the alleged invalidity of the orders of March 29, 1946, and asserted the right and title of the San Francisco Bank to the assets transferred to it by the orders. No date for trial has been set and the issues raised by the pleadings remain undecided.

QUESTIONS PRESENTED.

1. Whether the orders of March 29, 1946, readjusting the 11th Federal Home Loan Bank District and dissolving the Los Angeles Bank invaded any legally protected private rights of the bank or its members so as to give them standing to sue.
2. Whether out-of-state service of process on the members of the Home Loan Bank Board and other non-resident appellants under either Section 1655 or Section 2361 of Title 28, U.S.C. gives the Court jurisdiction to invalidate the orders of March 29, 1946.
3. Whether the allegations of the Los Angeles complaint that there was a failure to afford a hearing and make findings thereon or that the orders were issued for improper motives give the court jurisdiction to review the orders.
4. Whether the complaint fails to state a claim within the jurisdiction of the Court either (a) be-

cause the action constitutes a collateral attack upon administrative orders; or (b) because the orders are valid until duly set aside in an appropriate proceeding.

5. Whether the consolidated actions insofar as they seek to invalidate the orders of March 29, 1946, constitute an unconsented suit against the United States.

6. Whether prior to trial and a determination of the merits of this action, claimed by plaintiffs to be *quasi in rem* and claimed by defendants to be in personam, the Court is authorized to award attorneys' fees to plaintiffs' attorneys.

7. Whether in this action to recover property, based upon the alleged invalidity of the orders of March 29, 1946, the right and title to which property is in dispute between the plaintiffs and the defendants, the Court is authorized to award attorneys' fees out of such property.

8. Whether the deposits in Court are unavailable for payment of fees allowed to attorneys for the Los Angeles bank and its plaintiff shareholders (a) because they do not constitute funds "created, preserved or protected" by the plaintiffs; or (b) because the proceedings as a result of which the deposits were made constitute an impermissible collateral attack upon administrative orders; or (c) because the attorneys' fees are not alleged to have been earned in any of the intervention or interpleader proceedings in which the deposits were made; or

(d) because the order by its terms precludes payment out of any funds of Long Beach Association, and there are no other funds available for such payment.

SPECIFICATION OF ERRORS.

(1) The Court erred in determining that it had or has jurisdiction of the consolidated actions No. 5678 and 5421, or either of them, and its Findings of Fact and Conclusions of Law to that effect are erroneous.

(2) The Court erred in determining that it had jurisdiction in the consolidated actions over the persons of the Home Loan Bank Board, John H. Fahey, individually and as a Federal Home Loan Bank Commissioner, and Federal Savings and Loan Insurance Corporation, either

(a) on the ground that the actions are brought under 28 U.S.C. 1655, or

(b) by reason of the various subjoined and subsidiary interpleader or intervention proceedings, or

(c) by reason of any general appearance having been made on behalf of said parties, or

(d) by virtue of determinations by the District Court in previous orders entered in the consolidated actions that it has jurisdiction,

and its findings of fact and conclusions of law to the contrary are erroneous.

(3) The Court erred in determining that the legal services rendered by O'Melveny & Myers, Richard FitzPatrick, and W. I. Gilbert, Jr. have inured to the benefit of their respective clients so that they are now compensable, and Findings of Fact Nos. 14, 15, 16, 17, 18 and 21 are erroneous.

(4) The Court erred in determining that O'Melveny & Myers, Richard FitzPatrick, and W. I. Gilbert, Jr. are entitled to recover attorneys' fees upon their motion therefor and in fixing the amount of such fees.

(5) The Court erred in directing payment of such attorneys' fees out of funds and monies on deposit in the registry of the Court in the consolidated actions; and the Court especially erred in directing payment generally out of funds in the registry of the Court without designating the particular fund or funds from which the payment should be made, or the party or parties upon whom the burden of payment is to rest.

(6) The Court erred in exempting Long Beach Association and its property from the burden of contributing to the payment of said judgment while adjudicating that all other parties to the litigation and all other claimants to the funds on deposit in the registry of the Court are potentially liable for the payment of the same as may be determined in subsequent adversary proceedings which the Court reserves power to conduct.

SUMMARY OF ARGUMENT.

The order awarding attorneys' fees should be reversed because the District Court is without jurisdiction of the Los Angeles action in connection with which the award was made, as well as because of the absence of any legal basis upon which the award could be made.

I.

The Los Angeles action does not present a claim within the jurisdiction of the District Court. Neither the Los Angeles Bank nor its shareholder plaintiffs had any justiciable right which could be adjudicated by a Federal Court. The shareholders had no standing to sue because none of their legally protected rights was invaded by the orders of March 29, 1946, which readjusted the 11th and 12th Federal Home Loan Bank districts and consolidated the Los Angeles and Portland banks. The Los Angeles Bank had no standing to sue because, being an instrumentality of the United States performing solely governmental functions, it had no justiciable right to the continuance of its existence.

Further, the administrative action complained of is not subject to judicial review because it was the exercise of legislative authority properly delegated to the Board and involved determinations which the Act provided could be made only by the Board. This is not altered by the fact that the orders complained of were issued without notice, hearing or formal findings. The statute does not require such

hearing or findings and there exists no constitutional right of the plaintiffs to such hearing.

The Home Loan Bank Board and its members are indispensable parties to the maintenance of the Los Angeles action because no effective relief could be granted without compelling action by the Board. Valid service upon the Board and its members has not been had. Finally, the action is an unconsented suit against the United States because it seeks to compel official action by the Home Loan Bank Board, a branch of the Executive Department of the Government.

II.

The order awarding attorneys' fees cannot be sustained for the reason that it does not fall within any of the limited exceptions to the general rule that plaintiffs may not recover attorneys' fees from other parties to the litigation. This is not a case where a fiduciary is put to expense in defending an unfounded suit or in administering or protecting trust property. This is not a case where the plaintiffs have either recovered or preserved a fund for the benefit of a class. This is not an action *in rem* where fees may be allowed for services rendered directly to the Court or its representative. This is not a case resisting an application for the appointment of a receiver for a corporation, in which attorneys' fees may under some circumstances be allowed out of the undisputed property of such corporation.

This is a suit where the plaintiffs, attacking the validity of Governmental orders, valid on their face, seek to recover property, the right and title to which is claimed by the defendant, and seek attorneys' fees before a determination on the merits has been made. The plaintiff may not recover attorneys' fees out of the funds in dispute.

III.

In no event was the Court authorized to award attorneys' fees out of funds deposited in the registry of the Court. Such funds are improperly in Court because they result from impermissible collateral attacks upon administrative action. They are, therefore, not subject to disbursement by the Court.

Finally, the order awarding attorneys' fees cannot be sustained because the deposits out of which the fees are ordered paid were made in proceedings at most "in the nature of interpleader," and attorneys' fees may not be paid out of such deposits.

STATUTES AND ADMINISTRATIVE ORDERS INVOLVED.

The pertinent parts of the Federal Home Loan Bank Act (12 U.S.C. 1421), as well as the orders herein involved, are set forth in the Appendix, *infra*, pp. i to xxv. References in this brief to the statute and orders will designate the appropriate pages of the appendix.

ARGUMENT.**INTRODUCTION.**

The order involved in this appeal, allowing to attorneys for the former Federal Home Loan Bank of Los Angeles and some of its member-shareholders fees in the amount of \$75,000.00 and directing that it be paid out of funds on deposit in the registry of the Court, is without precedent in the law, contrary to public policy, and is not maintainable on any principles of justice or equity. The practical effect of the order is to require the defendant in an action, prior to trial and without final determination of any of the issues of fact or law involved, to compensate plaintiffs' attorneys for services rendered in prosecuting the case.

In support of appellants' contention that the order appealed from should be reversed, we will show

(a) In part I that the order appealed from cannot be sustained for the reason that the action in which it was entered fails to present a claim for relief within the jurisdiction of the Court below.

(b) In part II that apart from general jurisdictional objections, the Court did not have authority to award attorneys' fees to plaintiffs' attorneys or require their payment by any adverse party to the litigation.

(c) In part III that the Court did not have authority to direct the payment of attorneys' fees out of funds in the registry of the Court, since the funds

were improperly drawn into court through impermissible collateral attack on administrative action, are not legally chargeable with the attorneys' fees, and are not owned by parties who are liable for their payment.

I.

THE ORDER APPEALED FROM CANNOT BE SUSTAINED FOR THE REASON THAT THE ACTION IN WHICH IT IS ENTERED FAILS TO PRESENT A CLAIM FOR RELIEF WITHIN THE JURISDICTION OF THE FEDERAL COURTS.

As is shown below, the District Court is without jurisdiction of the Los Angeles action. Lacking jurisdiction, the Court had no authority to award attorneys' fees for the attorneys prosecuting the action. *Dubil v. Rayford Camp & Co.*, 184 F. (2d) 899 (9 C.A.); *Vicksburg, S. & P. Ry. Co. v. Nattin*, 54 F. (2d) 712 (D.C.).

(1) NEITHER THE FORMER SHAREHOLDERS OF THE LOS ANGELES BANK NOR THE BANK ITSELF HAVE STANDING TO MAINTAIN THE LOS ANGELES ACTION.

Plaintiffs' action is predicated on the erroneous assumption that the former Los Angeles Bank and its members have legal rights identical with those possessed by a private corporation and its stockholders. The fact that the Los Angeles Bank was an instrumentality of the United States and that its members possessed only the limited rights prescribed by statute is overlooked or ignored.

The rights and interests of members of a Federal Home Loan Bank are vastly different from those of stockholders of a private corporation. As is more fully shown herein the peculiar public and governmental nature of a Federal Home Loan Bank and the incidents of membership therein are such that the acts complained of by plaintiffs in this action do not in fact result in injury to any legally protected rights of plaintiffs. Thus neither the plaintiff former bank as such nor the plaintiff members have standing to sue. *Perkins v. Lukens Steel Co.*, 310 U.S. 113; *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118; *Alabama Power Co. v. Ickes*, 302 U.S. 464; *Massachusetts v. Mellon*, 262 U.S. 447.

(a) Plaintiff members of the former Los Angeles Bank have no standing to maintain this action.

By the orders of March 29, 1946, the former 11th District, consisting of the States of Idaho, Montana, Oregon, Utah, Washington and Wyoming and the Territory of Alaska, was consolidated with the former 12th District, consisting of the States of Arizona, California, Nevada and the Territory of Hawaii (App. *infra* p. xxiv). Prior to the consolidation, California associations and particularly the associations of Southern California had been in a position to elect at least half of the Board of Directors of the former Los Angeles Bank. Since the consolidated district contains, besides the territories, nine states, each of which is under regulations entitled to one elected

director,⁴ Southern California Associations lost the power which they had theretofore exercised in the 12th District. Indeed that loss of power is one of the allegations upon which the Los Angeles complaint rests (12511 R. 7479). As Judge Hall pointedly described this litigation in his memorandum opinion (R. 834), "It is a quarrel apparently over power".

But the loss of the power theretofore exercised by Southern California associations resulted not from the transfer of assets from the Los Angeles Bank to the San Francisco Bank, but solely and entirely from the readjustment of the 11th and 12th Federal Home Loan Bank Districts. The effect on the power of the Southern California associations would have been identical if, upon the consolidation of the two districts, the Portland Bank had been dissolved and its assets transferred to the Los Angeles Bank, and the latter, retaining all its assets, thus had become the bank for the consolidated district.

Readjustment of Federal Home Loan Bank Districts, specifically authorized by Section 3 of the Federal Home Loan Bank Act (App. *infra* p. i) however is the exercise of a purely governmental power in which no association has a justiciable interest. *Mt. Pleasant v. Beckwith*, 100 U.S. 514; *Hunter v. Pittsburgh*, 207 U.S. 161; *Commissioners of Laramie*

⁴There are only eight elected board members and the board has treated the States of Arizona and Nevada as one for this purpose and has not accorded minimum representation to the two territories (App. *infra*, p. xxiii).

County v. Commissioners of Albany County, 92 U.S. 307.

The fortuitous circumstances of the original districting by which California associations had the power to elect at least half of the directorate of a bank created no right to the continuance of such power. The statute itself denies such right. It authorizes the board, without the consent of any bank or any member association, to readjust districts, and readjustment would inevitably result in a change of voting power. The loss of the power did not therefore result from the invasion of any legally protected right of the California associations. *Sprunt & Son v. United States*, 281 U.S. 249; *Edward Hines Yellow Pines Trustees v. United States*, 263 U.S. 143, 147, 148; *United States v. Merchants & Manufacturers Traffic Assn.*, 242 U.S. 178, 188.

Nor were private rights otherwise invaded by the orders. The rights and incidents of membership in a Federal Home Loan Bank are specified and limited by the Federal Home Loan Bank Act and are not equivalent to the rights of a shareholder of a proprietary corporation. Such membership is available to any building and loan association or similar institution which can qualify under the provisions of the Act (Sec. 4, 5; App. *infra*, pp. i, iii). Membership is subject to approval of the Home Loan Bank Board (Sec. 4, 5) and "the Board may, after hearing, remove any member from membership, * * * if, in the opinion of the Board, such member * * * has failed to

comply with any provision'' of the Act or the Board's regulations pursuant thereto (Sec. 6(i), App. *infra*, p. viii). An eligible institution may become a member only of the Federal Home Loan Bank of the district in which is located the institution's principal place of business or under some circumstances of an adjoining district (Sec. 4(b), App. *infra*, p. ii).

Each member of a Federal Home Loan Bank is now required by the Act to invest and keep invested in stock of the bank an amount equal to 2% of the unpaid principal of its outstanding home mortgage loans (Sec. 6(1), App. *infra*, p. ix). The amount of capital investment required of each member is readjusted by the Home Loan Bank Board from time to time, and a member may request the retirement of stock in excess of that required and the return of its excess capital (Sec. 6(c), App. *infra*, p. iv). A member, other than a federal association, may withdraw from membership and secure the return of the amount subscribed for stock after payment of outstanding indebtedness to the bank (Sec. 6(i), App. *infra*, p. viii). Stock subscribed for by a member may not be hypothecated or transferred, except that with the consent of the Board stock may be transferred to another member or one eligible to membership (Sec. 6(h), (j), App. *infra*, pp. viii, ix).

Transfer of membership of member associations from the Los Angeles Bank to the San Francisco Bank, effected by Order No. 5082, invaded no right of the association plaintiffs because their rights are

limited by the statute. Whatever statutory right a bank shareholder has to be a member of *some* bank, it acquired and has no legal right to continue its membership in any *particular* bank. For when the statute vested in the board the power to dissolve a bank (Sec. 25, App. *infra*, p. xx), it specifically denied to the members any right to maintenance of membership in a particular bank.

Substitution of stock in the San Francisco Bank for stock in the Los Angeles Bank invaded no right of plaintiff associations. Purchase of bank stock is a condition of bank membership and does not confer a proprietary interest of any kind in the bank (*Peoples Bank v. Federal Res. Bk. of S. F.*, 58 F. Supp 25). The substitution of stock ownership in the San Francisco Bank for that in the Los Angeles Bank therefore affected no property right of the Association plaintiffs in the Los Angeles Bank. They had none.

Further, the power of the board so to substitute is indispensable to the exercise of the statutory power to readjust districts and to dissolve a bank. For there must be one and only one bank to a district. (Sec. 3, App. *infra*, p. i). Whatever right a state-chartered association has to remain a member of a bank could then, upon dissolution of the bank, be preserved only by transfer of its membership and stock ownership incident thereto to an existing bank in the district. Otherwise, dissolution would mean expulsion. Its right voluntarily to withdraw from membership

remains unaffected, because that right continues to exist under exactly the same conditions as it did before the transfer. Likewise the duty of Federal associations to be and remain a member could, upon dissolution of a bank, be enforced only by such transfer of its bank membership. Otherwise, it would cease to be a member of a bank, and such membership is mandatory (Sec. 5(f) Home Owners Loan Act; 12 U.S.C. 1464(f)).

The limited property rights they had in their shares of stock were in nowise impaired by the orders in controversy since their rights, defined by statute, remained unchanged. There is no allegation that any plaintiff member was denied those rights by the San Francisco Bank. And nowhere is it alleged that the San Francisco Bank cannot or has failed to accord to its members, including the association plaintiffs, all the services and facilities for which under the statute a home loan bank is organized and operates.

The transfer to the San Francisco Bank of the collateral for loans and the cash and bonds of the stockholders of the former Los Angeles Bank invaded no legal right of the shareholders of the former Los Angeles Bank. The deposits were made as an incident to membership, membership which, as is shown above, was subject to transfer by the Board. The legal right of the plaintiff shareholders was no more invaded by the transfer of securities from the Los Angeles Bank to the San Francisco Bank than it would have been by a transfer from one department

of the Government to another. In fact, so far as the member associations are concerned, the consolidation was, in effect, nothing more than a change of name of a government instrumentality which continued to hold their pledges and bailments under the same terms and conditions as before. In any event, nowhere is it alleged that plaintiffs made any demand for the return of their pledged or bailed property or that said return was refused by the San Francisco Bank. No "controversy" exists therefore as to such property.

(b) The former Los Angeles Bank has no standing to maintain this action.

Federal Home Loan Banks are not private corporations. They are instrumentalities of the United States established to carry out important governmental functions and therefore have no justiciable interest in their continued existence. Which agency of the United States shall exercise a governmental function is a question of general interest, common to all members of the public (cf. *In Re Levitt*, 302 U.S. 633). Each Federal Home Loan Bank established by the Board pursuant to the Federal Home Loan Bank Act, although organized in corporate form, exists solely as an instrument performing functions and exercising powers vested in the Government of the United States and not as a corporation created for private purposes or private profit. Its primary function is to provide, subject to the direction and control of the Home Loan Bank Board, reserve

banking facilities for savings and loan associations and similar institutions within its district (Sec. 10, 12 U.S.C. 1430). Each such bank is an integral and essential part of the financial system created by Congress through the Federal Home Loan Bank Act and the Home Owners' Loan Act of 1933 to promote home ownership and to provide adequate home financing.⁵

The statutory scheme providing for regional reserve banks to service institutions engaged in the field of home mortgage financing under the supervision and control of a central administrative agency is patterned after and closely follows the plan embodied in the Federal Reserve System for banks generally (12 U.S.C. 221) and the Federal Farm Loan Act for farm mortgages (12 U.S.C. 641). Judicial expressions of the nature and functions of the regional reserve banks established by the two earlier Acts are, by reason of the close similarity of plan and purpose, pertinent to the present inquiry. Thus it is clear that any such reserve bank created pursuant to a Congressional act is a government instrumentality and "every function" which it performs is governmental. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102; *Smith v. Kansas City Title and Trust Co.*, 255 U.S. 180; *Federal Land Bank v. Gaines*, 290 U.S. 247.

⁵No attack is made by plaintiffs upon the constitutionality of the Federal Home Loan Bank Act.

Under the Federal Home Loan Bank Act, the Home Loan Bank Board is vested with sole responsibility for the organization, reorganization and integration of the home loan bank system. The Board is required to divide the nation into districts, to establish a Federal Home Loan Bank for each such district and to determine the location of its principal office (Sec. 3, App. *infra*, p. i). The Board has specific power to delineate and readjust districts and to create new districts (Sec. 3) and to dissolve, liquidate or reorganize a Federal Home Loan Bank (Sec. 25, 26, App. *infra*, p. xx).

In addition, the Board is empowered without the consent of any bank or its members to issue consolidated debentures or bonds which are the joint and several obligations of all Federal Home Loan Banks, and to require the several banks to rediscount mortgages held by one bank or to make inter-bank loans or deposits. (Sec. 11, App. *infra*, p. xiii). The Board is also empowered to reject applications for membership in a bank and to "remove any members from membership" (Sec. 4(a), 6(i), App. *infra*, pp. i, viii). Four of each bank's directors are appointed by the Board, and the Board prescribes the rules and regulations under which the other eight directors are elected by member associations, each of which has one vote regardless of the number of shares it holds. The chairman and vice-chairman of the board of directors are designated by the Board (Sec. 7, App. *infra*, p. x). The Board's power of supervision and

control extends to the approval of the selection, employment and compensation of officers, employees, attorneys and agents. (Sec. 12, App. *infra*, p. xvi), and the Board has "power to suspend or remove any director, officer, employee or agent of any Federal Home Loan Bank" (Sec. 17, App. *infra*, p. xix). Indeed every power which a bank may exercise is "subject to the approval of the Board" (Sec. 12, App. *infra*, p. xvi).

That a Federal Home Loan Bank is a government instrumentality and not a proprietary corporation is further confirmed by the fact that "its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, or by any Territory, dependency or possession thereof, or by any State, county, municipality or local taxing authority" (Sec. 13, App. *infra*, p. xvii).⁶

A Federal Home Loan Bank is an instrumentality of the United States, exercises only governmental powers, and can therefore have no proprietary interest in its continued existence. This is particularly true where, as here, the supervising authority, i.e., the Home Loan Bank Board, has specific statutory authority to adjust bank districts and to dissolve, liquidate or reorganize a Federal Home Loan Bank (Secs. 25, 26, App. *infra*, p. xx).

⁶See *Federal Land Bank v. Priddy*, 295 U.S. 229; *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95; *Pittman v. Home Owners' Loan Corporation*, 308 U.S. 21, 32.

The complaint in this action seeks to recover for the former Los Angeles Bank assets transferred by Order No. 5082 to the San Francisco Bank. The basis for the relief sought is that its proprietary right in its existence has been violated. As we have shown, it had no such right. A Federal Home Loan Bank as an instrumentality of the United States performing only governmental functions has no more proprietary right in its continued existence than does a municipal corporation as an agency of a state. As Mr. Justice Moody said in *Hunter v. Pittsburgh*, 207 U.S. 161, at 178:

“Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in

other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest."

The conclusion is inevitable that no legally protected private rights of either the Los Angeles Bank or its members have been violated and the District Court, therefore, had no jurisdiction of the Los Angeles action.

**(2) THE ADMINISTRATIVE ACTION COMPLAINED OF IS NOT
SUBJECT TO JUDICIAL REVIEW.**

We have shown in the preceding subsection (1) that the complaint fails to disclose a justiciable controversy, since Orders Nos. 5082, 5083 and 5084, upon the alleged invalidity of which the action is based, do not adversely affect any legally protected right of the plaintiffs. The claim presented is non-justiciable for the further reason that the orders under attack are of such a nature that they are not subject to judicial review.

The Federal Home Loan Bank Act does not provide for judicial review and if such right is available it must be under principles established by the courts.⁷

⁷It cannot be successfully contended that the Administrative Procedure Act (5 U.S.C. 1001 etc.) affords any right to judicial review in this case. Since Section 10 of the Act relating to judicial review did not become effective until September 11, 1946, which was subsequent to the agency action complained of and the filing of this action, the Act is inapplicable to this case. Other cases pending at

The Courts have consistently denied review of the basis upon which action has been taken by an administrative agency in cases where as here Congress has authorized the Board "to take some specified legislative action when in its judgment that action is necessary or appropriate to carry out the policy of Congress" (*U.S. v. Bush & Co.*, 310 U.S. 371); or where the facts on which action must be taken "can only be known to an official or a body having wide experience in such matters and ready access to the means of information," (*Williamsport Wire Rope Co. v. United States*, 277 U.S. 551, 561) or are "delicate, complex, and involve large elements of prophecy," (*Chicago & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111),⁸ or where the decision must

the time the Administrative Procedure Act went into effect have been decided without reference to it. *United States v. Ruzicka*, 329 U.S. 287 (1946); *Board of Governors of the Federal Reserve System v. Agnew*, 329 U.S. 441 (1947); *Krug v. Santa Fe Pacific Rd. Co.*, 329 U.S. 591 (1947); *Patterson v. Lamb*, 329 U.S. 539 (1947); Attorney General's Manual, Administrative Procedure Act, pp. 93-94. In any event the Act affords no ground for judicial control of the discretionary power of the Board to create and adjust districts and to liquidate or reorganize Federal Home Loan Banks. The right of review granted by that Act runs to "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute". But as has been shown, the plaintiffs had no legal right which was affected by the adjustment of districts or by the liquidation of the Los Angeles Bank. See *supra*, pp. 23-35.

Section 10 of the Act exempts from the review provision action which is by law committed to agency discretion, 5 U.S.C. 1009. As shown herein, *infra*, pp. 37-38, the establishment and readjustment of districts and the establishment and liquidation of banks is by law committed to the discretion of the Board and involves matters beyond the competence of the Courts.

⁸It is interesting to note that Section 26 of the Federal Home Loan Bank Act requires a "finding" of what a condition *will be* in the future. Such a "finding" can be only a prophecy.

be based on "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie beneath consciousness without losing their worth" (*Chicago, B. & Q. R. Co. v. Babcock*, 204 U.S. 585, 598).

In carrying into effect the objectives of the Federal Home Loan Bank Act, broad legislative powers were conferred upon the Federal Home Loan Bank Board. The Board was authorized to "divide the continental United States * * * into not less than eight or more than twelve districts * * * with due regard to the convenience and customary course of business of the institutions eligible" to membership, and to establish a Federal Home Loan Bank in each District. The duties thus conferred were to be of a continuing nature. The Board was authorized "from time to time" to readjust such districts and create new districts (Sec. 3) and to "liquidate or reorganize any Federal Home Loan Bank," "whenever the Board finds that the efficient and economical accomplishment of the purposes of [the] Act will be aided by such action" (Sec. 26). The Act provides that each Federal Home Loan Bank shall have existence until dissolved by the Board or by Congress (Sec. 25). These powers are legislative. The Congress might itself have performed them but, for reasons of legislative efficiency, they were delegated to an administrative agency.⁹

⁹That the administrative action complained of is essentially legislative and political in character is strongly indicated by the

If, therefore this legislative function were to be subject to review or revision by the Courts, the effect would be "to substitute the determination of the Court for the determination which Congress intended should be made by the" Board. *Red River Broadcasting Co. v. F.C.C.*, 98 F. (2d), 282, 287; see *Marshall v. Pletz*, 317 U.S. 383, 388; *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 444. The Court would then have to weigh and measure the innumerable factors, economic and other, which would be involved. It would have to determine the effect of liquidation or reorganization, not merely on one bank or two banks, but upon the entire Federal Home Loan Bank system. For as shown, *supra*, p. 32, each bank is but part of an integrated national system, and by the statute, the determining factor for liquidation or reorganization of a bank is the effect on the entire system (Sec. 26). The Court has neither the aptitude nor the facilities to discharge such a responsibility. *Chicago & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103.

The fact that an administrative determination is final and conclusive does not of itself make the order reviewable. (*Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 303; *Louisiana v. McAdoo*, 234 U.S. 627, 633). Moreover, an order not otherwise subject to judicial review is not rendered

fact these plaintiffs and other collaborating parties have injected into the record of these proceedings evidence of application to Congress for the same relief sought here through two separate hearings before Congressional Committees, the report of one of which has been filed by the plaintiffs (R. 292) and the other of which is still in progress.

reviewable by the allegation that it was not justified by the facts. As the Court observed in *Dakota Central Tel. Co. v. South Dakota*, 250 U.S. 163, 184:

“The proposition that the President, in exercising the power [to take over telephone lines and fix rates], exceeded the authority given him, is based upon two considerations: First, because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; * * *. But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power.”

The allegation that improper motives prompted the promulgation of the orders, that their purpose was “wholly punitive and disciplinary and not otherwise”, do not subject the orders to judicial review. For, “if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it.” *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 145.

(3) THE FACT THAT THE ADMINISTRATIVE ORDERS COMPLAINED OF WERE ISSUED WITHOUT NOTICE, HEARING OR FORMAL FINDINGS, DOES NOT CREATE A JUSTICIABLE ISSUE.

The Federal Home Loan Bank Act does not require as a condition precedent to the agency action involved in orders Nos. 5082, 5083 and 5084 any notice, hearing or formal findings of fact, nor is there any such requirement under general law with respect to actions of the character here involved.

In performing functions of a legislative character, as distinguished from functions of a judicial nature directly affecting the personal or property rights of individuals or concerns, an administrative agency may, in the absence of statutory restrictions, ascertain in any manner it sees fit the facts constituting the basis for its action, and notice, formal hearings and specific findings of fact are not necessary. *Pacific States Box and Basket Co. v. White*, 296 U.S. 176, 186; *Buttfield v. Strahan*, 192 U.S. 470; *Borden Farm Prod. Co. v. Baldwin*, 293 U.S. 194; *Martin v. Wolfson*, 218 Minn. 557, 16 N.W. (2d) 884; *H. F. Wilcox Oil and Gas Co. v. State*, 162 Okla. 89, 19 Pac. (2d) 347; *Miles City v. State Board of Health*, 39 Mont. 405, 102 Pac. 696; *Commonwealth v. Sisson*, 189 Mass. 247, 75 N.E. 619.

It is well settled that when an administrative tribunal, in the exercise of delegated powers, reorganizes or alters governmental agencies, political instrumentalities or subdivisions, it is acting in a legislative capacity, and the principle of procedural due process is not available to those affected thereby. *Commissioners of Laramie County v. Commissioners of Albany County*, *supra*, 92 U.S. 307; *Mt. Pleasant v. Beckwith*, *supra*, 100 U.S. 514; *Hunter v. Pittsburgh*, *supra*, 207 U.S. 161; *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394; *Trenton v. New Jersey*, 262 U.S. 182; *McDonough v. Goodcell*, 13 Cal. (2d) 741, 91 P. (2d) 1035; *School District No. 3 v. Callahan*, 237 Wis. 560, 297 N.W. 407.

The recent decision in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, is consistent with

the foregoing cases. In the *Joint Anti-Fascist* case justiciability was found to consist of an alleged injury to a legally protected right; i.e., to be free from defamatory statements (341 U.S. at 139-41, 143, 159-60). Of course no comparable ground for justiciability exists here.

In our view the following language from the opinion of Mr. Justice Frankfurter in the *Joint Anti-Fascist* case is applicable to the administrative order involved here (341 U.S. at 167):

“Again, when decisions of administrative officers in execution of legislation turn exclusively on considerations similar to those on which the legislative body could itself have acted summarily, notice and hearing may not be commanded by the Constitution. *Bi-Metallic Invest. Co. v. State Board of Equalization*, 239 U.S. 441.”¹⁰

¹⁰Without conceding that the administrative determination involved here is comparable to that involved in the *Joint Anti-Fascist* case (the Attorney General’s listing of organizations as subversive or Communist); i.e., a determination as to the status or guilt of a particular organization, it should be pointed out that even as to the latter type of administrative determination a majority of the Supreme Court did not hold notice and an opportunity for a hearing to be required as a matter of due process. The prevailing opinion (that of Mr. Justice Burton, joined by Mr. Justice Douglas) noted that there had been no hearing (341 U.S. at 138, footnote 11), but the decision was rested solely on the ground that on the pleadings the designations by the Attorney General were admitted to be arbitrary and contrary to the material facts. As such, the designations were held to be beyond the authority delegated to the Attorney General by the President (341 U.S. at 124-6, 136-8).

In the dissenting opinion by Mr. Justice Reed, joined in by the Chief Justice and Mr. Justice Minton, it was held that due process did not require notice and hearing with respect to the administrative determination there involved. Four of the eight Justices participating, finding that private rights were involved, did hold that due process required notice and hearing with respect to the designation of organizations as Communist or subversive (341 U.S. at 143, 161-74, 175-8, 186-7).

Since a Federal Home Loan Bank is a federal instrumentality organized to carry out public policy (*supra*, pp. 30-35) and its functions are wholly governmental, neither the bank nor its members, although they are nominally stockholders, acquire under the provisions of the Bank Act, any vested interest in the continued existence of said bank or any legally protected private rights which would enable them to invoke the due-process clause. *People's Bank v. Federal Reserve Bank of San Francisco*, *supra*, 58 F. Supp. 25; *Federal Land Bank v. Bismarck Lumber Co.*, *supra*, 314 U.S. 95; *Knox National F. L. Assn. v. Phillips*, *supra*, 300 U.S. 194, 202; *Federal Land Bank v. Gaines*, *supra*, 290 U.S. 247, 254; *Greene County N.F.L. Assn. v. Federal Land Bank* (6 C.A.), 152 F. (2d) 215 (Cert. denied, 328 U.S. 834).

We have already shown (*supra*, pp. 24, 37) that the functions carried out by the Federal Home Loan Bank Commissioner in issuing orders 5082, 5083 and 5084 are purely legislative in character, and the orders do not infringe upon any personal or property rights of these plaintiffs which are subject to legal protection. It follows that notice, hearing and formal findings of fact were not necessary to the validity of the administrative acts taken, nor can the omission of such procedural steps be relied upon as constituting arbitrary or capricious conduct for the reversal of which these plaintiffs have any standing to sue. Such omission therefore constitutes no basis for judicial relief for these plaintiffs.

Nor in any event may the action of the Board be questioned in this suit. Here the plaintiffs, attacking

the validity of the orders of March 29, 1946, seek, by their own characterization of the Los Angeles action, to recover property and to remove clouds from the title. Only on that basis did they seek and secure an order for substituted service under 28 U.S.C. 1655 (12511 R. 9502).¹¹ The heart of the Los Angeles action is the alleged invalidity of the orders. If, however, those orders can be attacked at all by the plaintiffs, they can be attacked only in a direct action to set them aside. They are valid until "set aside" in an "appropriate judicial proceeding" or terminated by "subsequent order" of the Board. *United States v. Corrick*, 298 U.S. 435, 440; *United States v. Vacuum Oil Co.*, 158 Fed. 536; *Lehigh Valley R. Co. v. United States*, 188 Fed. 879. But an action to recover property transferred by the orders must necessarily proceed on the presumed invalidity of the orders, a presumption which the law does not permit. Such an action constitutes a collateral attack on their validity and cannot, therefore, be maintained. *Adams v. Nagle*, 303 U.S. 532.

(4) THE HOME LOAN BANK BOARD AND ITS MEMBERS ARE INDISPENSABLE PARTIES TO THE MAINTENANCE OF THE ACTION, AND VALID SERVICES ON THE BOARD OR ITS MEMBERS WERE NOT HAD.

The law of indispensable parties, as applied to the necessity for the presence of superior administrative officers in actions wherein the validity of their acts is questioned, has been recently restated in *Williams v. Fanning*, 332 U.S. 490, and has been followed by

¹¹A direct attack on the orders would, of course, have required personal service in the proper jurisdiction on the Federal Home Loan Bank Commissioner and upon the members of the Board.

this Court in *Daggs v. Klein*, 169 F. (2d) 174. These cases reaffirm the rule that a superior administrative officer is an indispensable party to an action where the relief sought "will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." *Williams v. Fanning*, *supra* (p. 493). The *Fanning* case also emphasizes that such superior official is indispensable to an action in which the relief requested would involve "risk that the judgment awarded would 'expend itself on the public treasury or domain, or interfere with public administration' " (*Williams v. Fanning*, *supra* (p. 493)).

Under either of these two tests the presence of the Home Loan Bank Board and its members is required in this action. The relief requested requires the re-division of the present Eleventh District into two districts for, as noted above, there can be one and only one bank to a district. It requires the reactivation of the Los Angeles Bank. It requires the appointment and election of officers and directors of the reactivated bank, for the terms of such officers and directors have long since expired.¹² It would require the reactivation of the Portland Bank as such. It would require issuance of new certificates of stock by both the Los Angeles and Portland banks. None of these requirements or any other essentials to the granting of the relief prayed for is possible without action by the Board. For no bank may exercise any functions

¹²Directors serve for definite terms and not until their successors are elected and qualified. Section 7, Federal Home Loan Bank Act, App. *infra*, p. x-xii.

vested in it by the Act except "subject to the approval of the Board" (Sec. 12). No decree of a Court and no act of any party properly before the Court could accomplish these essentials. For to act independently of Board approval is beyond the statutory powers of a bank, and the Court cannot authorize or compel a bank to exercise powers which the statute denies to it. To be effective, therefore, a decree of the Court granting the relief which the plaintiffs seek would necessarily require the Board "to take action * * * by exercising * * * a power lodged in" it. *Williams v. Fanning, supra*, p. 493.

The Courts can compel such action, if at all, only by the exercise of personal jurisdiction over the Home Loan Bank Board members. No subordinate subject to the jurisdiction of the Court has the power or authority which must be exercised to effectuate such a decree. Without Board action a decree attempting to grant the relief prayed for would be a futility, and could at most be only an advisory opinion. It would not be a "decree of a conclusive character" granting "specific relief." *Cf. Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241.

Moreover, to require such action, notwithstanding the absence of Board approval, would seriously "interfere with the public administration" and effective operation of the Home Loan Bank System not only in California and the present Eleventh District but throughout the nation. The entry of the decree sought by these plaintiffs might raise serious questions concerning the validity of consolidated debentures and

would certainly impede the issuance of additional such securities (Section 11(b) App. *infra*, p. xiii). Without Board approval, the functions of the San Francisco Bank or a reconstituted Los Angeles Bank could be performed only with serious financial risk to the directors, a risk which responsible persons would be reluctant to assume. Such a decree would impinge upon the Board's continuing duty to supervise the Federal Home Loan Bank System, for it would substitute a Court's supervision for that vested in the Board by statute. It would result in administrative chaos.

Admittedly, neither the Home Loan Bank Board nor its members were served in the State of California, nor have they subjected themselves personally to the jurisdiction of the Court. The attempt to bring them within the jurisdiction of the Court by means of substituted service, based upon 28 U.S.C. 1655, was unavailing. That section by its terms does not purport to confer personal jurisdiction upon absent defendants so served but authorizes only a judgment affecting the property which is the subject of the action. *Ladew v. Tennessee Copper Co.*, 179 Fed. 245; *Dan Cohen Realty Co. v. National Savings & Trust Co.*, 125 F. (2d) 288.

The complaint in this case is cast in terms of an action to quiet title to property. The indispensable prerequisite to a decree quieting title in this case would be a determination of the invalidity of the administrative orders complained of. Any attempt to recover property must await that determination. *Maya*

Corporation v. Smith, 32 F. (2d) 350; *Kleinschmidt v. Kleinschmidt Laboratories*, 89 F. Supp. 869, and such determination may not be made without personal jurisdiction of the Board and its members. *Wilhelm v. Consolidated Oil Corporation*, 84 Fed. (2d) 739; *Dan Cohen Realty Co. v. National Savings & Trust Co.*, *supra*, 125 Fed. (2d) 288; *Maya Corporation v. Smith*, *supra*, 32 Fed. (2d) 350.

The Court below found that the non-resident defendants have made general appearances, have sought and obtained affirmative relief and have submitted to the jurisdiction of the Court (R. 309) and that previous orders of the Court have established such general appearances and submission and, having been or become final by failure to appeal therefrom or by dismissal of appeals, have become the law of the case. Such findings are plainly erroneous as a matter of law. Under present practice objections to the jurisdiction of the Court may now be coupled with a defense on the merits. Rule 12(b) of the Federal Rules of Civil Procedure expressly so provides. *Orange Theatre Corp. v. Ray Heretz Amusement Corp.*, 139 F. (2d) 871; *Gerber v. Fruchter*, 147 F. (2d) 120; *Blank v. Bitken*, 135 F. (2d) 962; *Devine v. Griffenhagen*, 31 F. Supp. 624, 2 *Moore's Federal Practice*, p. 2260, 2d Ed. Thus, even though it could be said *arguendo* that the members of the Home Loan Bank Board and other non-resident defendants had in fact requested affirmative relief, or had taken and later dismissed appeals from prior orders, or had failed to appeal therefrom, it cannot successfully be contended that

the non-resident defendants thereby "waived" their objections to the Court's attempt to exercise personal jurisdiction over them made at the outset of the litigation and reiterated at every appropriate opportunity throughout its four and one-half years.¹³

It remains, therefore, that personal jurisdiction over the Board and its members is essential to the maintenance of this action, and such jurisdiction does not exist.

**(5) THE ACTION IS AN UNCONSENTED SUIT AGAINST
THE UNITED STATES.**

The statutory power in the Board to readjust districts and to liquidate the Los Angeles Bank is not and cannot be denied. There is alleged at most a wrongful exercise of the powers so granted. And the plaintiffs seek a decree undoing the allegedly wrongful exercise of the power.

But, as shown above (*supra* pp. 44-46), no decree of a Court which attempts to undo those results can be effective except as it requires specific action by the Board. Consequently, to afford effective relief to the plaintiffs the Court would have to require specific action by the Board; and any suit for specific relief against an officer or agency of the United States to compel official action is a suit against the United

¹³The contention that prior interim orders of the Court below can be relied upon to establish personal jurisdiction over non-resident defendants is discussed and shown to be entirely unsound as applied to the particular circumstances of this consolidated litigation in appellants' opening brief in Appeal 12,511, presently pending in this Court, pages 81-86.

States which may not be maintained except with its consent. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682; *American Dredging Co. v. Cochrane*, 190 Fed. (2d) 106.

The allegation, assumed *arguendo* to be sufficiently pleaded, that "said orders * * * and all of the acts and things done * * * pursuant thereto operated to and did (a) deprive [the plaintiffs] of * * * property without due or any process of law" (12511 R. 9476) does not and cannot alter the rule announced in the *Larson* case. For necessarily any action which the Board might take in approving the exercise of Bank powers is governmental. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682.

"Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property."

Larson v. Domestic and Foreign Commerce Corp., *supra*, at 691 n.

The United States has not consented to be sued herein. Congress refrained from making the Board a suable entity. It is an unincorporated agency of the United States without power to sue or be sued. The statute of the Board's creation therefore gave no consent. *Department of Agriculture v. Remond*, 330 U.S. 539.

The Administrative Procedure Act, even if that Act is applicable to this case, does not purport to waive the pre-existing immunity of the United States from suit. In general, as previously noted, that Act merely codifies the theretofore established rules governing the scope of judicial review. See Attorney General's Manual, p. 96; *Larson v. Domestic and Foreign Commerce Corp.*, *supra*. The authority in Section 10(e) to compel official action was not intended to enlarge the theretofore existing scope of judicial review. *State Airlines v. Civil Aeronautics Board*, 174 F. (2d) 510, 518. There is, of course, no ministerial duty prescribed by the Federal Home Loan Bank Act to restore the Los Angeles Bank or to return to it the assets theretofore transferred to the San Francisco Bank.

For each and all of the reasons above set forth, the District Court lacked jurisdiction of the Los Angeles action.

II.

ASSUMING, CONTRARY TO FACT AND LAW, THAT PLAINTIFFS' PLEADINGS STATE A CLAIM FOR RELIEF WITHIN THE COURT'S JURISDICTION, THE COURT ERRED IN AWARDING ATTORNEYS' FEES TO APPELLEES AND IMPOSING THE BURDEN OF THEIR PAYMENT UPON OTHER PARTIES TO THE LITIGATION.

- (1) IN THE ABSENCE OF CONTRACT OR STATUTE EXPRESSLY PROVIDING FOR THE RECOVERY OF ATTORNEYS' FEES, ATTORNEYS EMPLOYED IN LITIGATION MUST LOOK FOR THEIR COMPENSATION TO THE PARTY WHO EMPLOYED THEM, AND ARE ORDINARILY NOT ENTITLED TO RECOVER THEIR FEES FROM OTHER LITIGANTS.

This has always been the law in this country both in state and federal Courts. The rule is laid down in numerous well-considered decisions in practically all of the states, and is based upon public policy as declared in the leading case of *Oelrichs v. Spain*, 82 U.S. 211, in which the Court said at page 230:

“In debt, covenant and assumpsit, damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expense of the litigation to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. *More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse.* * * * We think the principle of disallowance rests on a solid foundation

and that the opposite rule is forbidden by the analogies of the law and sound public policy.” (Italics supplied.)

The *Oelrichs* case has been consistently followed in the federal Courts as is shown by:

Flanders v. Tweed, 82 U.S. 450;

Rude v. Buchhalter, 286 U.S. 451;

Gold Dust Corporation v. Hoffenberg (2 C.A.), 87 F. (2d) 451;

Marks v. Leo Feist Inc. (2 C.A.), 8 F. (2d) 460;

Zumsteg v. Aetna Casualty & Surety Co. (8 C.A.), 31 F. (2d) 65.¹³

The general rule applies to suits in equity as well as to actions at law. Of the federal cases cited above, in all of which the Courts refused to allow recovery of attorneys' fees, *Oelrichs v. Spain* was a suit in equity involving an injunction, *Rude v. Buchhalter* was a suit in equity to establish and foreclose a lien, and *Gold Dust Corporation v. Hoffenberg* was an equitable proceeding involving patent infringement. Other illustrative suits in equity in which attorneys' fees have not been allowed are *Van Sender v. Wil-*

¹³The same rule is universally applied in state courts, typical of which are:

In re Marre's Estate, 18 Cal. (2d) 191, 114 P. (2d) 591;

O'Morrow v. Board, 27 Cal. (2d) 794, 167 P. (2d) 483;

State v. City of Bremerton, 8 Wash. (2d) 93, 111 P. (2d) 612;

Kern v. Genter, 176 Ore. 479, 159 P. (2d) 190;

Hempstead v. Meadville Theological School, 286 Pa. 493, 134 Atl. 103;

Berndorf v. Thorpe, 126 Okla. 157, 259 Pac. 242.

kinson (C.A. D.C.), 76 F. (2d) 151 (suit to enforce a trust and for accounting) and *Doddridge County Oil & Gas Co. v. Smith* (4 C.A.), 173 F. 386 (suit to determine validity of oil and gas lease and to recover possession).

The rule which confines to narrow limits the right to recover attorneys' fees in litigation is in harmony with the historic policy of our law respecting the recovery of costs in general. No costs were recoverable by either party at common law. *Mutual Ben. Health & Accident Ass'n. v. Moyer* (9 C.A.), 94 F. (2d) 906. Later, a limited recovery of costs was permitted to the prevailing party by statute in England (6 Edward I. C. 2 and 23 Henry VIII) and these statutes remained the basis for the recovery of costs in our federal Courts until 1853 when the first federal cost statute was enacted (Rev. St. (1878) Sec. 983). This statute, after being carried forward with minor modification, has now been superseded by Chapter 123 of the Judicial Code (28 U.S.C., Sec. 1911-1929). It is significant that none of these cost statutes has ever provided for the recovery of substantial attorneys' fees. Only docket fees of nominal amount may be taxed (28 U.S.C., Sec. 1923). This provision for the recovery of specified nominal attorneys' fees precludes any inference that substantial attorneys' fees can be taxed as costs in a federal case, and it has been so held by this Court. *Mutual Ben. Health & Accident Ass'n. v. Moyer* (9 C.A.), 94 F. (2d) 906, in which the Court said:

“The right to costs is purely statutory. No such right existed at common law. *Day v. Woodworth*, 13 How. 363, 372, 14 L. Ed. 181. No party is entitled to costs until he prevails in the suit, in other words, until judgment is entered. Whatever the statute provides at that time is the measure of his allowable costs.”

- (2) AN ADVERSE PARTY MAY NOT RECOVER ATTORNEYS' FEES UNLESS THE CASE CLEARLY FALLS WITHIN THE LIMITED AND WELL DEFINED EXCEPTIONS TO THE GENERAL RULE AND THIS CASE DOES NOT FALL WITHIN ANY OF THEM.

The award of attorneys' fees herein appealed from cannot be sustained on any basis of special contract or statutory authorization. No special contract between any of the parties provides for recovery of attorneys' fees; nor is there any specific statutory authority for the award of fees in this case. Thus cases based on contract or statute need not be here considered. It should be noted, however, that while there are a number of federal statutes permitting the recovery of attorneys' fees in a variety of special situations, those statutes with practical unanimity limit the recovery of attorneys' fees to the “prevailing party”, with the necessary result that such statutory attorneys' fees can be allowed only after a trial on the merits.

The only question, therefore, is whether the present case falls within one of the recognized exceptions to the general rule that attorneys' fees are not recoverable, which exceptions for convenience may be divided into the following categories:

(a) Attorneys' fees have in some cases been assessed against a party to a suit in equity where "gross charges of fraud and misconduct have been made and not sustained", or "where the main ground of the suit is false, unjust, vexatious, wanton or oppressive, and so shown to be", or where a fiduciary relationship exists, such as trustee and beneficiary, pledgor and pledgee, or principal and agent, and the fiduciary is put to expense, either in defending an unfounded suit or in administering or protecting and preserving the trust property or pledged property. *Guardian Trust Co. v. Kansas City Southern Ry. Co.* (8 C.A.) 28 F. (2d) 233. No argument is needed to show that the order now before the Court on this appeal does not fall within this category. Moreover, in none of these instances is recovery of attorneys' fees against an adverse party allowed prior to a determination on the merits.

(b) Attorneys' fees may be allowed where the Court is administering a fund or property in a proceeding truly *in rem*, as in the administration of decedents' estates, administering insolvents' estates either through bankruptcy¹⁴ or liquidating equity re-

¹⁴The administration of the estate of a bankrupt is a proceeding *in rem*:

Hanover National Bank v. Moyses, 186 U.S. 181:

"Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem* * * *. Service of process or personal notice is not essential to the binding force of the decree."

To same effect:

6 *Am Jur.*, p. 569;

Local Loan Co. v. Hunt, 292 U.S. 234.

ceiverships,¹⁵ proceedings for corporate reorganization in bankruptcy, and admiralty and condemnation proceedings.

These strictly *in rem* proceedings comprise the principal group in which attorneys' fees, not authorized by contract or statute, are allowed and paid, and practically all of the situations where Courts make interim allowances on account of attorneys' fees. The allowance of attorneys' fees in such proceedings, whether interim or final, is predicated on the underlying nature of proceedings *in rem*, namely, that the Court itself has possession of the *res* and is directly charged with its administration,¹⁶ and that those parties who aid the Court are entitled to be paid out of the *res* as a part of the necessary cost of judicial administration. Where attorney or other fees are allowed in such cases they are granted for services rendered directly to the Court or its representative for the benefit of all parties or all claimants to the property before

¹⁵Administration of funds through equity receiverships are proceedings *in rem*.

Booth v. Clark, 17 How. 322, 331;

Atlantic Trust Co. v. Chapman, 208 U.S. 360, 370;

Culhane v. Anderson (8 C.A.), 17 F. (2d) 559.

¹⁶In *Porter v. Sabin*, 149 U.S. 473, 479, the Court said:

"When a Court exercising jurisdiction in equity appoints a receiver of all of the property of a corporation, the Court assumes the administration of the estate; the possession of the receiver is the possession of the Court; and the Court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the Court shall ultimately adjudge to be entitled to it."

the Court, not for services rendered to any of several adversary claimants for their sole benefit.

The complaint of the Los Angeles Bank and its shareholder members and the cross-claim of the Los Angeles Bank in the Mallonee action, as they have been construed by appellees, are suits to quiet title or to remove a lien or cloud upon title, and to recover possession of property and for an accounting. Neither a suit to quiet title or remove a lien or cloud on title, nor a suit to recover possession of property, nor a suit for an accounting, constitutes a proceeding *in rem*, or otherwise invests the Court with power to administer a fund or property. While a suit to quiet title or to remove a lien or cloud is sometimes described as a proceeding "*quasi in rem*",¹⁷ it differs fundamentally from an *in rem* action.¹⁸ In a quiet title proceeding the Court does not take possession of the property but merely adjudicates with respect to its title, and then only as between the plaintiff and the parties defendant who have received actual or constructive service of process. As to the right to re-

¹⁷In *McDaniel v. McElvy*, 91 Fla. 770, 108 So. 820, 830, the Court said:

"Suits of this nature [to quiet title] are not technically suits *in rem*, nor are they strictly speaking *in personam*, but, being against the person in respect of the res, wherein the decree does not extend beyond the property in controversy, these proceedings acquire a status that may be characterized as suits *quasi in rem*."

¹⁸*Pennoyer v. Neff*, 95 U.S. 714;
Arndt v. Griggs, 134 U.S. 316, 326;
 1 C.J.S., p. 944;
Gassert v. Strong, 38 Mont. 18, 98 P. 497.

cover costs and attorneys' fees, the same rules prevail as in ordinary *in personam* actions.¹⁹

It is obvious, therefore, that the award of attorneys' fees to appellees may not be justified by this group of precedents. In neither of the consolidated actions is there any *res* being administered by the Court; the deposits are simply being held in Court pending a determination of the rights thereto. No facts or circumstances are alleged in any of the pleadings which would invoke the *in rem* jurisdiction of the Court; none of the pleadings seek to invest the Court with *in rem* authority and the Court has not, through the appointment of a receiver, trustee, administrator or other representative of the Court, attempted to exercise any *in rem* jurisdiction. The mere fact that various funds have been deposited in Court does not create *in rem* jurisdiction. Such deposits are frequently made as incident to *in personam* litigation without changing the essential nature of such actions. And the fact that a federal suit in equity involves a dispute as to the ownership of a fund on deposit in Court does not render such suit an *in rem* proceeding or entitle one party to recover attorneys' fees from another party, or from the fund.

Hauenstein v. Lynham, 100 U.S. 483, 491;

Hobbs v. McLean, 117 U.S. 567, 582;

¹⁹44 Am. Jur., p. 83;

Faxon v. All Persons, 166 Cal. 707, 137 P. 919, 925.

In a suit to quiet title, attorneys' fees are not allowed either as damages or costs; *McGuinness v. Hargiss*, 56 Wash. 162, 105 P. 233, 234.

National Bank v. Whitney, 103 U.S. 99, 103 U.S. 104.

In *Leary v. United States*, 257 Fed. 246 (4 C.A.), the Court in holding that the Leary Estate, after being awarded a portion of a fund which had been paid into Court, was not entitled to recover its attorneys' fees either from the other litigants or out of their portion of the fund, said:

"We find no authority for subjecting the defeated party to any greater liability. In *Hauenstein v. Lynham*, 100 U.S. 483, 491, the Supreme Court said: 'It is a settled rule in this Court never to allow counsel on either side to be paid out of the fund in dispute.' "

In *Riddle v. Hudgins*, 58 Fed. 490, 494, the Court said at page 494:

"We know of no case where a Court can take the money of a plaintiff which happens to come into its possession, and use it to pay his adversary's attorneys. The cases are very rare where the Court is justified in directing the payment of attorneys' fees out of a fund in Court, and, without stopping to enumerate them, it is enough to say that this is not one of them. *Trustees v. Greenough*, 105 U.S. 527; *Hauenstein v. Lynham*, 100 U.S. 483, 491."

(c) In an action or proceeding brought by one or more for the benefit of a class, or under circumstances which result in conferring benefits upon others similarly situated, and where by reason of plaintiffs' ac-

tion a fund or property has been created or preserved, or property rights have been established which inure to the benefit of others, equity will under proper circumstances permit the plaintiff to recover his expenses of litigation "as between solicitor and client" including reasonable attorneys' fees.

Trustees v. Greenough, 105 U.S. 527;²⁰

Hobbs v. McLean, 117 U.S. 567, 581;

Sprague v. Titonic Bank, 307 U.S. 161;

Crump v. Ramish (9 C.A.), 86 F. (2d) 362;

O'Hara v. Oakland County (6 C.A.), 136 F. (2d) 152.

The right to recover is, however, entirely dependent on the success of the litigation in establishing the common benefit.

Hobbs v. McLean, 117 U.S. 567;

Sprague v. Titonic Bank, 307 U.S. 161;²¹

Hempstead v. Meadville Theological School, 286 Penn. 493, 134 Atl. 103;

Merrick v. Bonness, 66 Minn. 135, 68 N.W. 850;

Forrester v. Boston & M. Consol. & Silver Min. Co., 29 Mont. 397, 74 P. 1088, 76 P. 211.

²⁰The cases dealing with the "fund doctrine" as a basis for the recovery of attorneys' fees are collected and discussed in 49 A.L.R. 1190 and 107 A.L.R. 749. See also 19 C.J.S., p. 256 and 14 Am. Jur., p. 46, et seq.

²¹In *Sprague v Titonic Bank*, *supra*, the Court said:

"They (costs as between solicitor and client) are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal places such a claim in better perspective than it would have in an earlier stage."

And since the right to the allowance is contingent upon success, the application for fees prior to the determination of an action is premature.

Goodwin v. Castleton, 19 Wash. (2d) 748, 144 P. (2d) 725;
Uffelman v. Boillin, 19 Tenn. App. 1, 82 S.W. (2d) 545.

Furthermore, such fees are not assessable as costs against the party to the litigation but are payable only out of the fund or property which has been created or preserved, or by proportional contribution from those who have benefited by the action.

Trustees v. Greenough, 105 U.S. 527;
Buford v. Tobacco Growers' Co-op Ass'n. (4 C.A.), 42 F. (2d) 791, at 792;
Crump v. Ramish (9 C.A.), 86 F. (2d) 362;
O'Hara v. Oakland County (6 C.A.), 136 F. (2d) 152;
Winslow v. Harold G. Ferguson Corporation, 25 Cal. (2d) 274, 148 P. (2d) 86.

Since this action has not yet been tried, the appellees have not "prevailed" in their action, and no fund or property has yet been created or preserved. Any allowance of attorneys' fees to appellees at the present stage of the litigation is obviously premature. Furthermore, if and when the appellees do prevail in the action any attorneys' fees allowed may be made payable only out of the fund or property recovered or by proportional contribution from those who have benefited by appellees' action. Clearly, the order

awarding attorneys' fees to appellees at this stage of the proceeding cannot be sustained under the principles or authorities noted in this subsection (c).

(d) Nor can the order appealed from be sustained by the authorities holding that where an application has been made for the appointment of a receiver for a corporation, attorneys' fees and expenses in resisting such application, if made in good faith and upon reasonable grounds, may in the sound discretion of the Court be allowed as a claim in the receivership.

In the proceeding below appellees cited in support of their contention the following cases:

Ex parte Fahey, 332 U.S. 258;

Barnes v. Newcomb, 89 N.Y. 108, 115-116;

Anderson v. Great Republic Life Insurance Co., 41 Cal. App. (2d) 181, 106 P. (2d) 75;

Pickrel v. Merion (6 C.A.), 66 N.E. (2d) 273;

Caminetti v. State Mut. Life Ins. Co., 52 Cal. App. (2d) 326, 126 P. (2d) 169.

Ex parte Fahey, 332 U.S. 258, is not in point. In that case the Supreme Court denied an application for writ of mandamus and prohibition to stop the payment of an attorneys' fee to counsel for the shareholder plaintiffs in the Mallonee action solely on the ground that it was not a proper case for the exercise of the extraordinary power of the Court since appeal was an adequate remedy. The Court said (p. 259):

“The petition involves serious questions of law and of fact. Whether, because of the pendency of the appeal and the stay order granted therein,

the District Court had power to entertain the application, whether before the final outcome of the case could be known an allowance was premature, whether the source of the fund on deposit with the court was so related to the services as to be subject to disbursement for their compensation, and whether one judge can make allowances in a case before a three-judge court, are, with other questions, much contested. *We do not decide any question as to the merits.*" (Italics supplied.)

The leading case in support of this rule of law, *Barnes v. Newcomb*, *supra*, as well as the other cases cited, fall into the same general pattern briefly described as follows: A suit is brought against a corporation alleging insolvency and asking for the appointment of a receiver. The suit is resisted but plaintiff prevails and a receiver is appointed. The corporation or its attorney then files a claim *in the receivership* for attorney's fees and costs. The cases hold that the Court may, in its discretion, allow the claim if it is convinced that the resistance was offered in good faith and for probable cause.²²

The reason for the rule is that since the directors of a corporation are trustees for the benefit of its shareholders, they have the legal duty to take proper

²²"It is a general rule that where an application has been made for the appointment of a receiver for a corporation, attorneys' fees and expenses in resisting such application, if made in good faith and upon reasonable grounds, may become a valid claim *against the receiver.*" (Italics supplied.) *Anderson v. Great Republic L. Ins. Co.*, 41 Cal. App. (2d) 181, at 191, 106 P. (2d) 75.

steps to protect the corporation. If in the discharge of that duty they honestly and reasonably believe that the appointment of a receiver would not be to the advantage of the shareholders, they may defend the suit and incur a valid claim against the corporation in so doing.²³

The law established by *Barnes v. Newcomb* affords no support for the order involved in this appeal. In fact, the receivership cases and the instant case are characterized by their differences rather than by their resemblances:

(1) In the receivership cases, the corporation's attorneys' fees are being paid out of the corporation's undisputed assets, while in the instant case the

²³The reason for the rule is well stated in *Esarey v. Pierson*, 84 Ind. App. 109, 141 N.E. 87, as follows:

"It is the duty of the officers of a corporation as trustees of all interested therein to take the necessary steps to protect its corporate existence, and to repel an attack which they regard as unfounded, and it is proper that reasonable expenses incurred by them for that purpose be allowed them. But it is entirely in the discretion of the court administering the fund to determine up to what stage opposition is proper, and what is a reasonable sum to be allowed, or whether any allowance should be made."

And in *Watson v. Johnson*, 174 Wash. 12, 24 P. (2d) 592, the reason underlying the rule is stated thus:

"The principle upon which an allowance is made is that counsel fees and costs of the litigation are in the nature of expenses incurred by the corporation and its directors in the protection and preservation of the trust which they represent; and, even if it turns out that a case is made for interference by the appointment of a receiver and the dissolution of the corporation, so long as the defense was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and the fund involved in the litigation to the expenses incurred in discharging a general duty cast upon the corporation and its directors to take all reasonable means for its protection."

plaintiffs' attorneys' fees are sought to be paid out of property which defendant claims to own.

(2) In the receivership cases the attorneys' fees are not allowed as costs in an action between adverse claimants to property, but as an indebtedness validly incurred by the corporation. There is, therefore, involved no question of taxing the attorneys' fees of one party against another party to the litigation.

(3) In the receivership cases the attorneys' fees are allowed not as part of the proceedings in the litigation for the appointment of a receiver, but as a debt of the corporation to be paid out of its undisputed assets by the receiver.

(4) In the receivership cases before the claim for attorneys' fees may be allowed it must affirmatively appear that the action was defended in good faith and upon reasonable grounds and for probable cause, facts which can only be determined by a trial of the action on the merits, while in the instant case attorneys' fees have been ordered paid prior to trial on the merits and, therefore, without any basis for determining good faith, reasonable ground or probable cause.

Eggert v. Pacific States Savings & Loan Company, 53 Cal. App. (2d) 552, 127 P. (2d) 999, cited below, does not support the award of attorneys' fees. There the building and loan commissioner, in possession of all the assets of the Pacific States Savings & Loan Company, which included assets transferred to it by the Fidelity Savings and Loan Association, could not,

because of his position, defend against a suit brought by shareholders of the Fidelity Association to impress a trust on part of such assets. The Pacific States Company thereupon defended the suit, were unsuccessful, but were allowed attorneys' fees out of the *undisputed* assets of the Pacific States Company.²⁴ There was involved in that case no question of payment of attorneys' fees incurred in behalf of one litigant out of assets claimed by another.

It is apparent, therefore, that this is not a case in which the Court may award attorneys' fees. On the contrary, it is a case in which the Courts have consistently denied applications for fees. For this is a case whose purpose is to regain for some of the members of the former Los Angeles Bank the power

²⁴It is true that the Court, as did the plaintiffs, proceeded on the theory that the assets sought to be recovered in the Los Angeles action belonged indisputably to the Los Angeles Bank. In the hearing at which the motion for fees was granted, the Court said (R. 761):

"They are not saying that they want attorney fees from the defendant; they say they want attorney fees from *their own money which the defendant has got * * **" (Emphasis supplied.)

And again in what appears to be a rhetorical question addressed to Mr. Dusenbery, the Court said (R. 764):

"You mean to say that somebody can come in and take your property, your house and all your property and your bank account, under some claim or color of right, and that you would be compelled to finance your lawsuit against him and could not finance it out of *your own property in his possession?*" (Emphasis supplied.)

However, the ownership of those assets is the very question to be determined in the Los Angeles action, and until the case is decided on its merits the Court may not assume that the orders of March 29, 1946, are void or that such assets belong to the Los Angeles Bank.

to elect the management of a bank.²⁵ Corporate funds may not be used to finance such litigation.

Chabot & Richard Co. v. Chabot, 109 Me. 403, 84 A. 892;

Jesse v. Four-Wheel Drive Auto Co., 177 Wis. 627, 189 N.W. 276;

Hooker, Corser & Mitchell Co. v. Hooker, 88 Vt. 335, 92 A. 443;

Harbison v. First Presbyterian Society of Hartford, 46 Conn. 528, 33 Am. Rep. 34;

Lawyers' Advertising Co. v. Cons. Ry. Lighting & Refr. Co., 187 N.Y. 395, 80 N.E. 199.

Thus we have shown in this section of the brief that the award of attorneys' fees cannot be sustained on any theory of law. We have discussed the law as it applies to private litigants. However, those rules of law apply here with even greater force. For, as indicated, "the controversy does not lie, in its present aspect, in the field of private corporation law." Cf., *Greene County Nat. F. L. Ass'n v. Federal Land Bank*, 152 F. (2d) 215, 219. As has been shown, a Federal Home Loan Bank is an instrumentality of the United States performing important governmental functions. The funds of the bank are funds used

²⁵That this is a "quarrel over power" and not an action brought for the benefit of all the class whom the association plaintiffs purport to represent, is amply demonstrated by the suit in the United States District Court for the Northern District of California (*supra*, p. 7). There ten Northern California associations, former members of the Los Angeles Bank, brought an independent class action to enjoin the San Francisco Bank and its directors from executing a proposed stipulation under which the Los Angeles Bank would have been re-constituted. That suit was promptly enjoined in the consolidated action.

only in the performance of such functions. They must, therefore, be public funds. Cf., *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524; *D'Oench Duhme & Co., Inc. v. Federal Deposit Insurance Corp.*, 315 U.S. 447; *Federal Deposit Ins. Corp. v. Citizens' State Bank*, 130 F. (2d) 102. Public policy should prohibit the use of those funds for the benefit of a few who seek to regain the management of a federal instrumentality.

III.

ASSUMING, CONTRARY TO FACT AND LAW, THAT PLAINTIFFS' PLEADINGS STATE A CLAIM FOR RELIEF WITHIN THE COURT'S JURISDICTION AND THAT THE COURT IS AUTHORIZED TO AWARD ATTORNEYS' FEES, THE COURT ERRED IN DIRECTING PAYMENT OF SUCH FEES OUT OF MONIES ON DEPOSIT IN THE REGISTRY OF THE COURT.

The authorities cited and discussed in the preceding Section II of this brief establish the proposition that the fees of appellees' attorneys may not be assessed against appellants nor be made payable out of funds or property in dispute. As we have already seen, (*supra*, pp. 56-59), the fact that the action involves funds which have been drawn into Court does not transform it into one in which attorneys' fees are recoverable.

The order appealed from is unique. It is not a judgment directing the Federal Home Loan Bank of San Francisco to pay the amount of attorneys' fees allowed. It directs the clerk of the Court to make the payment "forthwith" out of funds on deposit

in the registry of the Court. Moreover, the order directs payment "generally from funds in the Registry of the Court" and purports to reserve for future determination the "fixing, allowance, allocation, assessment, or apportionment of attorneys' fees * * * for or against any or all of the parties * * *", excepting that such fees shall never be "allocated against or imposed upon funds or assets of Long Beach Federal Savings and Loan Association or any of its shareholders, members, or stockholders", and that the Association shall never be required to deposit any additional money or property in Court because of the payment of attorneys' fees under the order appealed from. In other words, the order directs the payment of the attorneys' fees generally out of the funds in Court, but reserves the right later to allocate the payment among the various funds and claimants thereto, excepting that Long Beach Association and its property shall be immune from contributing to such payment.

A brief examination of the funds on deposit in Court will show that the necessary effect of the devious provisions of the order is to impose payment of the attorneys' fees upon the appellants, and particularly upon the appellants Federal Home Loan Bank of San Francisco and Federal Savings and Loan Insurance Corporation.

There are no general funds on deposit in Court. All funds were deposited in purported interventions or interpleaders as to each of which several separate and distinct claims are asserted.

All of the funds in the registry of the Court were created in proceedings in the Malhonnee case and relate to the business and affairs of the Long Beach Association. None of the legal services described in the order appealed from were performed in connection with any of the interpleaders or interventions in which the deposits were made. And in none of the proceedings which resulted in the deposits in Court has the Los Angeles Bank asserted any claim for attorneys' fees.

As to five deposits in the registry of the Court, the Los Angeles Bank is not a party to any of them and has not claimed any interest in them. These five deposits may be briefly described as follows:

(1) Notes and deeds of trust deposited by Title Service Company, as trustee, of the original face amount of \$800,000.00 (12511 R. 43), and to which other notes and deeds of trust have subsequently been added (e.g., 12511 R. 995, 2588). The deposits were made in alleged interpleader proceedings brought by Title Service Company in which Long Beach Association and A. V. Ammann as Conservator of the Association were alleged to be the adverse claimants. No other person or party is alleged or shown to have any interest in the deposited securities.

(2) More than \$1,500,000.00 was paid into the registry of the Court by various debtors of Long Beach Association in connection with approximately fifty separate intervention proceedings (e.g., 12511 R. 1228, 1608, 1674), for the alleged purpose of clearing

title to approximately 400 properties. The intervention proceedings were alleged to be necessary because Long Beach Association refused to accept payment or to direct the trustee to reconvey and denied the right of the Conservator to do so, on the alleged ground that his appointment was invalid, with the asserted result that intervenor's titles could be cleared only by depositing the payments in Court and obtaining a Court order directing the Long Beach Association and the Conservator to instruct the trustee to make the reconveyances. The funds so deposited clearly belong to the Long Beach Association.

(3) A \$50,000.00 cashier's check payable to Robert H. Wallis, deposited unendorsed in Court in a proceeding alleged to be in the nature of interpleader, in which the said Wallis as the plaintiff in interpleader and the Long Beach Association and Armann as Conservator of said Association, are alleged to be the adverse claimants (12511 R. 86). This check and the proceeds thereof belong either to Long Beach Association or to the said Wallis, and no other person or party is alleged or shown to have any interest therein.

(4) The sum of \$55,485.25 was deposited in Court in May, 1949, by Long Beach Association in a proceeding alleged to be in the nature of an interpleader involving disputed insurance premiums claimed by Federal Savings and Loan Insurance Corporation to be due and owing (12511 R. 6473). Similar additional deposits were made (12511 R. 6920, 8965). The proceedings disclose that the only possible claimants

to this fund are Long Beach Association and Federal Savings and Loan Insurance Corporation.

(5) The sum of \$18,503.52 was deposited in the registry of the Court by George Turner (12511 R. 3461) in a so-called interpleader proceeding in which Turner was the plaintiff, and Long Beach Association is alleged to be an adverse claimant and no other adverse claimants were named. Turner disclaims any interest in the fund and the Long Beach Association is the only possible claimant.

It seems clear that neither the Los Angeles Bank nor the plaintiff shareholder members thereof are entitled to recover their attorneys' fees from any of the above described deposits. Such payment could not be made without an unlawful invasion of the property rights of others who could not on any theory known to the law be held liable for payment of these attorneys' fees. The first (1), the second (2), and the fifth (5) deposits belong indisputably to Long Beach Association. The third (3) belongs either to Robert H. Wallis or to Long Beach Association. The fourth (4) belongs either to Long Beach Association or to Federal Savings and Loan Insurance Corporation. The Long Beach Association is expressly exempted by the terms of the order allowing attorneys' fees from all obligation to contribute directly or indirectly to their payment, while Robert H. Wallis and Federal Savings and Loan Insurance Corporation are strangers to the controversy in which the fees were incurred.

Moreover, aside from the Turner "interpleader", the basis for which is incomprehensible, each of the interventions and interpleaders out of which the deposit in Court arose results from a collateral attack upon the order of the Federal Home Loan Bank Administration appointing a conservator for the Long Beach Association. Each rests upon a presumption which denies the validity of that order. But the appointment was valid until "set aside" in an "appropriate judicial proceeding" or terminated by "subsequent order of the Board". *United States v. Corrick*, *supra*, 298 U.S. 435; *Lehigh Valley R. Co. v. United States*, *supra*, 188 Fed. 879. Each of the "interpleaders", therefore, constitutes a collateral attack upon that order, a collateral attack which is clearly impermissible and which cannot be maintained. *Adams v. Nagle*, 303 U.S. 532. The deposits made pursuant thereto are, consequently, improperly in Court and not subject to disbursement by the Court.

Thus, there remains for consideration only the sixth deposit, briefly described as follows:

(6) Promissory notes in the principal amount of \$6,300,000 executed on behalf of Long Beach Association by Ammann as its Conservator in favor of the San Francisco Bank, evidencing a loan of money made by the bank to Long Beach Association through its Conservator, together with collateral security thereof, were deposited in the registry of the Court pursuant to order dated March 13, 1948 (12511 R. 8399). The collateral initially deposited consisted of United States Government bonds of the face value of

\$5,300,000 and promissory notes and deeds of trust originally pledged to the San Francisco Bank. The notes and deeds of trust were subsequently returned to Long Beach Association, and cash in excess of \$1,000,000 then on deposit in Court as a result of intervention proceedings described in (2) above was by order of Court declared to be substituted collateral (12511 R. 8533-8534). The proceeding in which said deposit was made is alleged to be in the nature of interpleader, in which Long Beach Association is the plaintiff claiming all the property impleaded, and the San Francisco Bank and the Los Angeles Bank are alleged to be the defendants in interpleader and the adverse claimants to said notes and collateral.

The claim of the Los Angeles Bank for an award of fees out of this fund, is predicated upon the alleged invalidity of Order 5082 transferring its assets to the San Francisco Bank, and that it is therefore entitled to trace those assets through the San Francisco Bank into the funds in the registry of the Court. The Long Beach Association asserts that it is entitled to the same notes and collateral because they were given to the San Francisco Bank by Ammann as Conservator, and that Ammann acted without authority in that the order appointing him was invalid. Long Beach Association further asserts that if the notes are valid obligations it is in doubt as to which bank the obligations are owed, thus also raising the issue of the validity of Orders 5082, 5083 and 5084. The entire purported interpleader proceeding involving these notes and the security therefor is thus

clearly an impermissible collateral attack based solely on an unallowable presumption of the invalidity of four administrative orders, and as such the so-called interpleader proceeding involving the sixth deposit cannot be maintained. (*Adams v. Nagle*, 303 U.S. 532.)

Even if the interpleader proceeding could be maintained, the Los Angeles Bank and its shareholder members would not under any view of the law be entitled to the payment of their attorneys' fees out the funds impleaded. The proceeding is not a true interpleader. Since the plaintiff Long Beach Association claims an interest in the property impleaded, the proceeding is at most an action in the nature of interpleader. The law is well settled that where a proceeding is merely one "in the nature of interpleader" and the plaintiff is not a disinterested stakeholder but is himself a claimant or has a controversy with the claimant, not only is the impleading plaintiff not entitled to recover attorneys' fees (*Groves v. Selltell*, 153 U.S. 465; *Century Ins. Co. v. First Nat. Bank*, (5 C.A.), 133 Fed. (2d) 789; *Gulf Pipe Line v. Warren*, 45 S.W. (2d) 719, 722 (Tex. Civ. App. '31); 48 *C.J.S.* p. 105), but even the prevailing claimant cannot recover such fees from the fund impleaded or from any adverse party. In *Guardian Life Insurance Co. v. Rosenbaum* (3 C.A.), 280 Fed. 861, it was held that a prevailing claimant could not recover his attorneys' fees from the other parties, since "the fund is in no way created by the defendant claiming it". To the same effect are *Amer-*

ican Water Works & Electric Co. v. Allegheny T. Co., 43 Fed. Supp. 102 (D.C. Pa.) (aff'd 125 Fed. (2d) 561), and *Continental Trust Co. v. Corbin*, 80 Fed. Supp. 394. Obviously, a claimant in interpleader cannot recover from the impleaded fund attorneys' fees incurred in another action or proceeding.

The Court's order directing payment of attorneys' fees out of the deposits in Court is therefore without authority in law. Particularly is this true since the payment invaded lien rights of appellant, Federal Home Loan Bank of San Francisco, and operated to reduce the funds held in Court which are security for indebtedness due the San Francisco Bank. For the order directs "that the amounts, or any part thereof, herein allowed and ordered paid from said funds shall never be allocated against or imposed upon funds or assets owned by or belonging to the Long Beach Federal Savings and Loan Association" and that "Long Beach Association shall not at any time be required to deposit any additional money or property in Court in these consolidated actions upon or because of the payment of all or any portion of the sums herein ordered and directed to be paid". Since there are no general funds on deposit in Court, the effect of the order is to require payment of fees for attorneys of Los Angeles Bank out of funds previously, by the Court's own order, set aside as substituted collateral securing the obligations owed to the San Francisco Bank. The order further specifically insures that the resulting impairment of collateral shall never be cured.

CONCLUSION.

It is therefore submitted that the order of the District Court awarding attorneys' fees is not sustainable and should be reversed.

Dated, San Francisco, California,

October 5, 1951.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

FEDERAL HOME LOAN BANK ACT AS AMENDED (12 U.S.C. 1421.)

* * * * *

SEC. 3. As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable the board shall establish, in each district, a Federal Home Loan Bank at such city as may be designated by the board. Its title shall include the name of the city at which it is established. (12 U.S.C. 1423.)

SEC. 4. (a) Any building and loan association, savings and loan association, cooperative bank, home-stead association, insurance company, or savings bank, shall be eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank if such institution (1) is duly organized under the laws of any

State or of the United States; (2) is subject to inspection and regulation under the banking laws, or under similar laws, of the State or of the United States; and (3) makes such home mortgage loans as, in the judgment of the board, are long-term loans (and in the case of a savings bank, if, in the judgment of the board, its time deposits, as defined in section 19 of the Federal Reserve Act, warrant its making such loans). No institution shall be eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank if, in the judgment of the board, its financial condition is such that advances may not safely be made to such institution or the character of its management or its home-financing policy is inconsistent with sound and economical home financing, or with the purposes of this Act.

(b) An institution eligible to become a member or a nonmember borrower under this section may become a member only of, or secure advances from, the Federal Home Loan Bank of the district in which is located the institution's principal place of business, or of the bank of a district adjoining such district, if demanded by convenience and then only with the approval of the board.

(c) Notwithstanding the provisions of clause (2) of subsection (a) of this section requiring inspection and regulation under law as a condition with respect to eligibility for membership, any building and loan association which would be eligible to become a member of a Federal Home Loan Bank except for the fact that it is not subject to inspection and regulation

under the banking laws or similar laws of the State in which such association is organized shall, upon subjecting itself to such inspection and regulation as the board shall prescribe, be eligible to become a member.

SEC. 5. No institution shall be admitted to or retained in membership, or granted the privileges of nonmember borrowers, if the combined total of the amounts paid to it for interest, commission, bonus, discount, premium, and other similar charges, less a proper deduction for all dividends, refunds, and cash credits of all kinds, creates an actual net cost to the home owner in excess of the maximum legal rate of interest or, in case there is a lawful contract rate of interest applicable to such transactions, in excess of such rate (regardless of any exemption from usury laws), or, in case there is no legal rate of interest or lawful contract rate of interest applicable to such transactions, in excess of 8 per centum per annum in the State where such property is located. This section applies only to home mortgage loans made after the enactment of this Act. (12 U.S.C. 1424.)

SEC. 6. (a) As soon as practicable after the enactment of this Act, the board, with the approval of the Secretary of the Treasury, shall determine the minimum capital of each Federal Home Loan Bank which shall be not less than \$5,000,000. The board shall, as soon as practicable thereafter, open books in each district established under section 3 for subscription to the capital stock of the Federal Home Loan Bank of the district.

(b) The capital stock of each Federal Home Loan Bank shall be divided into shares of a par value of \$100 each. The minimum capital stock shall be issued at par. Stock issued thereafter shall be issued at such price not less than par as may be fixed by the board.

(c) The original stock subscription for each institution eligible to become a member under section 4 shall be an amount equal to 1 per centum of the aggregate of the unpaid principal of the subscriber's home mortgage loans, but not less than \$500. The board shall from time to time adjust the amount of stock held by each member so that, as nearly as possible, such member shall at all times have invested in the stock of the Federal Home Loan Bank at least an amount calculated in the manner provided in the preceding sentence (but not less than \$500). If the board finds that the investment of any member in stock is greater than that required under this section, upon application of such member, the bank shall pay such member for each share of stock in excess of the amount so required an amount equal to the value of such stock, or, at the election of the bank, the whole or any part of the payments which would be so made shall be credited upon the indebtedness of the member to the bank. In either such event, stock equal in value to the amount of the payment or credit, or both, as the case may be, shall be surrendered and canceled. No share of stock shall be surrendered and canceled if the effect of such surrender and cancellation would be to violate the provisions of section 10 (c) requiring the amount of stock

held by such member to equal at least one-twelfth of the outstanding advances to such member.

(d) Stock subscriptions other than by the United States shall be paid for in cash, and shall be paid for at the time of application therefor, or, at the election of the subscriber, in installments, but not less than one-fourth of the total amount payable shall be paid at the time of filing application, and a further sum of not less than one-fourth of such total shall have been paid at the end of each succeeding period of four months.

(e) If the law of the State under which an institution described in section 4 operates does not permit such institution to subscribe for stock in the Federal Home Loan Bank but if such institution has the power to borrow money and give security therefor, the board may permit such institution to obtain advances on the same terms and conditions and subject to the same limitations as members (except that such institution shall not be required, during the period during which advances may be made under this subsection, to subscribe for stock in the Federal Home Loan Bank or to deposit such stock as collateral security as required in section 10), but such institution shall be required to keep on deposit such security, in addition to home mortgages, for such advances, as the board shall determine, which shall equal in value 1 per centum of the aggregate unpaid principal of such institution's home mortgage loans (but not less than \$500). No advance to any such institution shall be made under

authority of this subsection after the State in which the institution is organized enacts legislation authorizing such institution to subscribe for Federal Home Loan Bank stock or after the expiration of the next regular session of the legislature of such State begun after the enactment of this Act, whichever is earlier. If, at the end of such time, such institution is not authorized to subscribe for stock, the bank shall proceed to liquidate the indebtedness of such institution to the bank and to terminate its relations with such institution. No advance shall be made under authority of this subsection which matures more than one year after the advance is made, but the bank may renew any such advance for yearly periods, or less, thereafter. The maturity of no advance authorized under this subsection shall be later than the time of the enactment of legislation authorizing such institution to become a member or the expiration of such session of the legislature of the State, whichever is earlier.

(f) The Secretary of the Treasury shall subscribe, on behalf of the United States, for such part of the minimum capital of each Federal Home Loan Bank as is not subscribed for by members under subsection (c) of this section within thirty days after books have been opened for stock subscriptions as provided in subsection (a). Payments for stock subscriptions by the Secretary of the Treasury shall be subject to call in whole or in part by the board, with the approval of the Secretary of the Treasury, at such time or times as may be deemed advisable. Each Federal Home Loan Bank receiving such payments shall issue receipts

therefor to the Secretary of the Treasury, and such receipts shall be evidence of the stock ownership of the United States. The aggregate amount expended by the United States for the purchase of stock under this Act shall not exceed \$125,000,000. The Reconstruction Finance Corporation Act, approved January 22, 1932, is amended by adding at the end of section 2 thereof the following new paragraph:

“In order to enable the Secretary of the Treasury to make payments upon stock of the Federal Home Loan Banks subscribed for by him in accordance with the Federal Home Loan Bank Act, the sum of \$125,000,000, or so much thereof as may be necessary for such purpose, is hereby allocated and made available to the Secretary of the Treasury out of the capital of the corporation and/or the proceeds of notes, debentures, bonds, and other obligations issued by the corporation. For the purposes of this paragraph, the corporation shall issue such notes, bonds, debentures, and other obligations as may be necessary.”

(g) After the amount of capital of a Federal Home Loan Bank paid in by members equals the amount paid in by the Secretary of the Treasury under subsection (f), such bank shall apply annually to the payment and retirement of the shares of the capital stock held by the United States, 50 per centum of all sums thereafter paid in as capital until all such capital stock held by the United States is retired at par. Stock held by the United States may at any time, in the discretion of the Federal Home Loan Bank, and with the approval of the board, be paid off at par and retired

in whole or in part; and the board may at any time require such stock to be paid off at par and retired in whole or in part if in the opinion of the board the Federal Home Loan Bank has resources available therefor: *Provided*, That accumulated dividends, as provided in subsection (k), have been paid.

(h) Stock subscribed for otherwise than by the United States, and the right to the proceeds thereof, shall not be transferred or hypothecated except as hereinafter provided and the certificates therefor shall so state.

(i) Any member may withdraw from membership in a Federal Home Loan Bank six months after filing with the board written notice of intention so to do, and the board may, after hearing, remove any member from membership, or deprive any nonmember borrower of the privilege of obtaining further advances, if, in the opinion of the board, such member or nonmember borrower has failed to comply with any provision of this Act or the regulations of the board made pursuant thereto or if, in the opinion of the board, such member or nonmember borrower is insolvent. In any such case, the indebtedness of such member or nonmember borrower to the Federal Home Loan Bank shall be liquidated, and the capital stock in the Federal Home Loan Bank owned by such member shall be surrendered and canceled. Upon the liquidation of such indebtedness such member or nonmember borrower shall be entitled to the return of its collateral, and, upon surrender and cancellation of such capital stock, the member shall receive a sum equal to its cash

paid subscriptions for the capital stock surrendered, except that if at any time the board finds that the paid-in capital of a Federal Home Loan Bank is or is likely to be impaired as a result of losses in or depreciation of the assets held, the Federal Home Loan Bank shall on the order of the board withhold from the amount to be paid in retirement of the stock a pro rata share of the amount of such impairment as determined by the board.

(j) A Federal Home Loan Bank may, with the approval of the board, permit the disposal of stock to another member, or to an institution eligible to become a member, but only to enable such an institution to become a member.

(k) All stock of any Federal Home Loan Bank shall share in dividend distributions without preference.

(l) Within one year after June 27, 1950, each member of each Federal Home Loan Bank shall acquire and hold and thereafter maintain its stock holding in an amount equal to at least 2 per centum of the aggregate of the unpaid principal of such member's home mortgage loans, home-purchase contracts, and similar obligations, but not less than \$500. Such stock in excess of the amount hereby required may be purchased from time to time by members and may be retired from time to time as heretofore. One year after June 27, 1950, each Federal Home Loan Bank shall retire and pay off at par an amount of its stock held by the Secretary of the Treasury equivalent to the amount of its stock held by its members in excess

of the amount required to be held by them by the first two sentences of subsection (c) of this section immediately prior to June 27, 1950, and annually thereafter each Federal Home Loan Bank shall retire an amount of such Government stock equivalent to 50 per centum of the net increase of its stock held by members since the last previous retirement: *Provided*, That none of such Government capital shall at any time be retired so as to reduce the aggregate capital stock, reserves, surplus, and undivided profits of the Federal Home Loan Banks to less than \$200,000,000: *Provided further*, That notwithstanding any provision of this subsection, nothing in this subsection shall limit or affect the operation of subsection (g) of this section. (12 U.S.C. 1426.)

SEC. 7. (a) The management of each Federal Home Loan Bank shall be vested in a board of twelve directors, all of whom shall be citizens of the United States and bona fide residents of the district in which such bank is located.

(b) Four of such directors shall be appointed by the Board and shall hold office for terms of four years; except that the terms of office of the two such directors heretofore appointed shall expire at the end of the calendar years 1936 and 1937, respectively, and the terms of office of the first two such directors hereafter appointed shall expire at the end of the calendar years 1938 and 1939, respectively.

(c) Six of such directors, two of whom shall be known as class A directors, two of whom shall be

known as class B directors, and two of whom shall be known as class C directors, shall be elected as provided in subsection (e), and shall hold office for terms of two years; except that the terms of office of the directors heretofore elected or appointed shall expire at the end of the terms for which they were elected or appointed.

(d) Two of such directors shall be elected by the members of the Federal Home Loan Bank without regard to classes under rules and regulations to be prescribed by the Board, and shall hold office for terms of two years; except that the term of office of one of the directors first elected under this subsection shall expire at the end of the calendar year 1936.

(e) The board shall divide all the members of each Federal Home Loan Bank into three groups which shall be designated as groups A, B, and C, which groups shall represent, respectively, and as fairly as may be, group A, the large, group B, the medium-sized, and group C, the small members, the size of such members to be determined according to the aggregate unpaid principal of the member's home mortgage loans. The board may revise the membership of such groups from time to time. Of the directors elected as hereinafter provided, each class A director shall be an officer or director of a member in group A, each class B director shall be an officer or director of a member in group B, and each class C director shall be an officer or director of a member in group C. Each member shall be entitled to nominate suitably qualified persons for election as directors of the class corresponding to

the group to which such member belongs, and shall cast one vote for each director in its class. The directors of each class shall be nominated and elected in accordance with such rules and regulations as may be prescribed by the board.

(f) Any director appointed or elected as provided in this section to fill a vacancy shall hold office only until the expiration of the term of his predecessor.

(g) The board shall designate one of the directors of each bank to be chairman, and one to be vice chairman, of the board of directors of such bank.

(h) If at any time when nominations are required, members shall hold less than \$1,000,000 of the capital stock of the Federal Home Loan Bank, the board shall appoint a director or directors to fill the place or places for which such nominations are required. A director so appointed shall serve until the expiration of the calendar year during which he takes office.

(i) Each bank may pay its directors reasonable compensation for the time required of them, and their necessary expenses, in the performance of their duties, in accordance with the resolutions adopted by such directors, subject to the approval of the board.

(j) Such board of directors shall administer the affairs of the bank fairly and impartially and without discrimination in favor of or against any member or nonmember borrower, and shall, subject to the provisions hereof, extend to each institution authorized to secure advances such advances as may be made safely and reasonably with due regard for the claims and

demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations. (12 U.S.C. 1427.)

* * * * *

SEC. 11. (a) Each Federal Home Loan Bank shall have power, subject to rules and regulations prescribed by the board to borrow and give security therefor and to pay interest thereon, to issue debentures, bonds, or other obligations upon such terms and conditions as the board may approve, and to do all things necessary for carrying out the provisions of this Act and all things incident thereto.

(b) The board may issue consolidated Federal Home Loan Bank debentures which shall be the joint and several obligations of all Federal Home Loan Banks organized and existing under this Act, in order to provide funds for any such bank or banks, and such debentures shall be issued upon such terms and conditions as the board may prescribe. No such debentures shall be issued at any time if any of the assets of any Federal Home Loan Bank are pledged to secure any debts or subject to any lien, and neither the board nor any Federal Home Loan Bank shall have power to pledge any of the assets of any Federal Home Loan Bank, or voluntarily to permit any lien to attach to the same while any of such debentures so issued are outstanding. The debentures issued under this section and outstanding shall at no time exceed five times the total paid-in capital of all the Federal Home Loan Banks as of the time of the issue of such

debentures. It shall be the duty of the board not to issue debentures under this section in excess of the notes or obligations of member institutions held and secured under section 10 (a) of this Act by all the Federal Home Loan Banks.

(c) At any time that no debentures are outstanding under this Act, or in order to refund all outstanding consolidated debentures issued under this section, the board may issue consolidated Federal Home Loan Bank bonds which shall be the joint and several obligations of all the Federal Home Loan Banks, and shall be secured and be issued upon such terms and conditions as the Board may prescribe.

(d) The board shall have full power to require any Federal Home Loan Bank to deposit additional collateral or to make substitutions of collateral or to adjust equities between the Federal Home Loan Banks.

(e) Each Federal Home Loan Bank shall have power to accept deposits made by members of such bank or by any other Federal Home Loan Bank or other instrumentality of the United States, upon such terms and conditions as the board may prescribe, but no Federal Home Loan Bank shall transact any banking or other business not authorized by this Act.

(f) The Board is authorized and empowered to permit, or whenever in the judgment of at least four members of the board an emergency exists requiring such action, to require, Federal Home Loan Banks, upon such terms and conditions as the board may prescribe, to rediscount the discounted notes of members

held by other Federal Home Loan Banks, or to make loans to, or make deposits with, such other Federal Home Loan Banks, or to purchase any bonds or debentures issued under this section.

(g) Each Federal Home Loan Bank shall at all times have an amount equal to the sums paid in or outstanding capital subscriptions of its members, plus an amount equal to the current deposits received from its members, invested in (1) obligations of the United States, (2) deposits in banks or trust companies, (3) advances with a maturity of not to exceed one year which are made to members or nonmember borrowers, upon such terms and conditions as the board may prescribe, and (4) advances with a maturity of not to exceed one year which are made to members or nonmember borrowers whose creditor liabilities (not including advances from the Federal Home Loan Bank) do not exceed 5 per centum of their net assets, and which may be made without the security of home mortgages or other security, upon such terms and conditions as the board may prescribe.

(h) Such part of the assets of each Federal Home Loan Bank (except reserves and amounts provided for in subsection (g)) as are not required for advances to members or nonmember borrowers, may be invested, to such extent as the bank may deem desirable and subject to such regulations, restrictions, and limitations as may be prescribed by the board, in obligations of the United States and in such securities as fiduciary and trust funds may be invested in under the laws of

the State in which the Federal Home Loan Bank is located. (12 U.S.C. 1431.)

SEC. 12. The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business, but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more than ten years; to sue and be sued, to complain, and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and, by its board of directors, to prescribe, amend, and repeal by-laws, rules and regulations governing the manner in which its affairs may be admin-

istered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this Act, as are customary and usual in corporations generally. (12 U.S.C. 1432.)

EXEMPTION FROM TAXATION

SEC. 13. Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with un-

earned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any home-owner debtor of such bank. (12 U.S.C. 1433.)

SEC. 14. When designated for that purpose by the Secretary of the Treasury, each Federal Home Loan Bank shall be a depository of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and it may also be employed as a financial agent of the Government; and it shall perform all such reasonable duties as depository of public money and financial agent of the Government as may be required of it. (12 U.S.C. 1434.)

SEC. 15. Obligations of the Federal Home Loan Banks issued with the approval of the board under this Act shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. The Federal reserve banks are authorized to act as depositaries, custodians, and/or fiscal agents for Federal Home Loan Banks in the general performance of their powers under this Act. All obligations of Federal Home Loan Banks shall plainly state that such obligations are not obligations of the United States and are not guaranteed by the United States.

* * * * *

FEDERAL HOME LOAN BANK BOARD

SEC. 17. For the purposes of this Act there shall be a board, to be known as the "Federal Home Loan Bank Board", which shall consist of five citizens of the United States appointed by the President of the United States, by and with the advice and consent of the Senate. Not more than three members of the board shall be members of the same political party. Each member shall devote his entire time to the business of the board. Before entering upon his duties each of the members shall take an oath faithfully to discharge the duties of his office. The President of the United States shall designate one of the members of the board to serve for a term of two years, one for three years, one for four years, one for five years, and one for six years from the date of the enactment hereof, and thereafter the term of each member shall be six years from the date of the expiration of the term for which his predecessor was appointed. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the board shall receive a salary at the rate of \$10,000 per annum: *Provided*, That during the fiscal year 1933 the salary shall be \$9,000 per annum. The President shall designate one of the members as chairman of the board. The chairman shall be the chief executive officer of the board and in his absence or disability the duties of his office shall be performed by some one of

the other members to be designated as acting chairman by the chairman in such order as he may determine. The board shall supervise the Federal Home Loan Banks created by this Act, shall perform the other duties specifically prescribed by this Act, and shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this Act. The board shall have power to suspend or remove any director, officer, employee, or agent of any Federal Home Loan Bank, the cause of such suspension or removal to be communicated in writing forthwith to such director, officer, employee, or agent and to such Federal Home Loan Bank. (12 U.S.C. 1437.)

* * * * *

SEC. 25. Each Federal Home Loan Bank shall have succession until dissolved by the board under this Act or by further Act of Congress. (12 U.S.C. 1445.)

SEC. 26. Whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire

assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part. (12 U.S.C. 1446.)

* * * * *

ORDERS OF HOME LOAN BANK BOARD (OR FEDERAL HOME LOAN BANK ADMINISTRATION)

FEDERAL HOME LOAN BANK ADMINISTRATION

Order No. 5082. Date March 29, 1946

WHEREAS, it has been and is hereby determined that the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action contemplated herein; now, therefore,

IT IS HEREBY ORDERED That effective March 29, 1946, the Federal Home Loan Bank of Los Angeles shall be liquidated and reorganized and all assets and property of any kind or nature of such bank, including any unexpended amounts in approved and outstanding budgets and personnel but excluding officers and directors, are hereby transferred to the Federal Home Loan Bank of Portland and all the liabilities and obligations of such Federal Home Loan Bank of Los Angeles are to be assumed by the Federal Home Loan Bank of Portland and are hereby declared to be and become the liabilities and obligations of the Federal Home Loan Bank of Portland. The President of the Federal Home Loan Bank of Portland (hereinafter called Federal Home Loan Bank of San Francisco) is hereby authorized and directed to execute, issue or sign in the

name of the Federal Home Loan Bank of Los Angeles or in the name of the Federal Home Loan Bank of San Francisco as the successor and legal assignee of the assets, property, liabilities and obligations of the Federal Home Loan Bank of Los Angeles such instrument or instruments as may be necessary or advisable and to cancel, assign or otherwise dispose of in whole or in part, any lease under which the Federal Home Loan Bank of Los Angeles has been bound or committed. All members of the Federal Home Loan Bank of Los Angeles are to become members of the Federal Home Loan Bank of Portland and the Federal Home Loan Bank of Portland (hereinafter called Federal Home Loan Bank of San Francisco) is ordered and directed to issue appropriate evidences of the ownership of all of the stock formerly held by the Federal Home Loan Bank of Los Angeles including stock purchased and held on behalf of the U. S. Government. The charter of said Federal Home Loan Bank of Los Angeles is hereby canceled.

IT IS FURTHER ORDERED AND DIRECTED That effective March 29, 1946, the said Federal Home Loan Bank of Portland shall move and is hereby moved to the city of San Francisco, California, and shall be known hereafter as the Federal Home Loan Bank of San Francisco. Subject to the Federal Home Loan Bank Act, as amended, and the charter and by-laws of the Federal Home Loan Bank of San Francisco, including right of dismissal, said bank shall have as its directors, officers, employees, attorneys, and agents the directors,

officers, employees, attorneys, and agents transferred, elected, designated, or appointed, to, by or for the Federal Home Loan Bank of Portland for the calendar year 1946 and shall operate under the charter and by-laws used by the Federal Home Loan Bank of Portland until duly changed.

IT IS FURTHER ORDER AND DIRECTED That effective March 29, 1946, and until changed by the Board of Directors of the Federal Home Loan Bank of San Francisco and approved by the Federal Home Loan Bank Administration, the said Federal Home Loan Bank of San Francisco shall maintain a branch of said bank in the cities of Portland, Oregon, and Los Angeles, California.

IT IS FURTHER ORDERED AND DIRECTED That in order to provide for adequate representation of the states in the Federal Home Loan Bank of San Francisco region, effective August 1, 1946, the terms of all directors of said bank shall expire and that prior to July 1, 1946, a new election of directors shall be held. The terms of all officers of said bank shall expire upon the designation by the Board of Directors after August 1, 1946, of new officers and their approval by the Federal Home Loan Bank Administration. In such election and in future elections of the Federal Home Loan Bank of San Francisco the states of Nevada and Arizona shall constitute one state with the right of minimum representation to be alternated between each of said states within the rules and regulations and orders of the Federal Home Loan Bank System pro-

viding for a minimum representation from each state in a Federal Home Loan Bank district. On or before July 1, 1946, the Federal Home Loan Bank Administration shall appoint or reappoint four public-interest directors whose terms shall begin August 1, 1946, but shall end respectively December 31, 1946; December 31, 1947; December 31, 1948; and December 31, 1949.

IT IS FURTHER ORDERED AND DIRECTED That the Federal Home Loan Bank of San Francisco shall take such other action subject to the approval of the Federal Home Loan Bank Administration as may be necessary or desirable for the effective operation of the Federal Home Loan Bank of San Francisco.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

— — —,
Secretary.

FEDERAL HOME LOAN BANK ADMINISTRATION
Order No. 5083. Date March 29, 1946

Pursuant to Section 3 of the Federal Home Loan Bank Act, as amended, and the powers vested in me by law, the district of the Federal Home Loan Bank of Portland is readjusted and shall have added thereto the states of Arizona, California and Nevada, and the Territory of Hawaii.

The said Federal Home Loan Bank of Portland is moved to San Francisco and shall be known as the Federal Home Loan Bank of San Francisco.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

— — —,
Assistant Secretary.

FEDERAL HOME LOAN BANK ADMINISTRATION
Order No. 5084. Date March 29, 1946

Pursuant to Section 25 of the Federal Home Loan Bank Act, as amended, and the powers vested in me by law the Federal Home Loan Bank of Los Angeles is dissolved.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

— — —,
Assistant Secretary.

No. 12591
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN H. FAHEY, *et al.*,

Appellants,

vs.

O'MELVENY & MYERS, W. I. GILBERT, JR., and RICHARD
FITZPATRICK,

Appellees.

and

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

O'MELVENY & MYERS, W. I. GILBERT, JR., and RICHARD
FITZPATRICK,

Appellees.

Brief of Appellees O'Melveny & Myers and Richard
Fitzpatrick (Counsel for Federal Home Loan Bank
of Los Angeles and Certain of Its Member Asso-
ciations).

RICHARD FITZPATRICK,

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PAUL P. O'BRIEN
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TOPICAL INDEX.

	PAGE
Jurisdictional statement	2
Statement of the case.....	3
Summary of argument.....	8

I.

<p>The Los Angeles action is not an action brought, as such, to review the actions of the Commissioner evidenced by his orders Nos. 5082, 5083 and 5084. It is, on the contrary, a plenary equity action quasi in rem brought under former Judicial Code, Section 57. Therein the effect of the orders above referred to, which concededly constitute the sole muniments of title under which the San Francisco Bank claims, is drawn in question purely as an incident to the District Court's inquiry into title, ownership, and the right to possession of the assets and properties constituting the res before the court. In addition to this, and as an incident to its basic jurisdiction in rem, the court has acquired jurisdiction in personam of the San Francisco Bank, the party in actual possession of the assets and properties in dispute.....</p>	10
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II.

<p>The activities of the Commissioner leading up to the seizure of the demanded assets and properties are subject to judicial scrutiny</p>	14
--	----

III.

<p>The contention of appellants that neither the Los Angeles Bank nor its member associations have any standing to question the validity of the orders of March 29, 1946, is devoid of merit</p>	24
--	----

IV.

The contention of appellants that the Home Loan Bank Board and its members are indispensable parties is devoid of merit, as is the contention that these are unconsented suits against the United States.....	26
---	----

V.

Under the plain provisions of 28 U. S. C., Section 1655, the District Court had and has power and jurisdiction to hear and determine all questions material to the claim of Los Angeles Bank and its member associations that their respective titles to the assets and properties in dispute should be quieted, that clouds upon such titles should be removed and that possession of such assets and properties should be restored to their rightful owners.....	31
--	----

VI.

Upon the case made by the pleadings in the actions below and by the findings in this proceeding, Los Angeles Bank is in precisely the same situation as is any corporation whose assets are seized by public authority in visitatorial proceedings.....	35
A. In such a case, the corporation, acting in good faith, is entitled to its day in court to contest the validity of the seizure; and, irrespective of whether or not a case is ultimately made out for the interference of state or governmental authority, it is entitled to an allowance, out of the seized assets, of fees to its attorneys; otherwise, as the cases say, it would be hamstrung in any bona fide effort to defend itself.....	35

VII.

Under such circumstances, an interim allowance of attorneys' fees is proper. The test is not that of ultimate success or failure in the litigation; it is whether or not the defense or the cause of action, as the case may be, is, as the District Court here found, conducted in good faith and on reasonable grounds	43
--	----

VIII.

The District Court did not err in directing payment of the attorneys' fees out of moneys in the registry of the court; and appellants' arguments to the contrary are moot and academic	49
Conclusion	51

TABLE OF AUTHORITIES CITED

CASES	PAGE
Abraham v. Daugherty, 60 Cal. App. 297.....	15
Anderson v. Great Republic Life Ins. Co., 41 Cal. App. 2d 181	35, 37, 41
Assets Realization Co. v. Defrees, 80 N. E. 263.....	35
Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U. S. 280	33
Barnes v. Newcomb, 89 N. Y. 108.....	35, 36, 42, 43
California Employment Comm'r v. Malm, 59 Cal. App. 2d 322....	15
Caminetti v. State Mutual Life Ins. Co., 52 Cal. App. 2d 326....	36
Carter, In re, 177 F. 2d 75.....	25
Cowell Lime & Cement Co. v. Williams, 182 Cal. 691.....	14
Dingwell v. Seymour, 91 Cal. App. 483.....	36
Eggert v. Pacific States Savings & Loan Co., 53 Cal. App. 2d 554	36, 45, 48, 50
Eisler v. Clark, 77 Fed. Supp. 610; cert. den., 338 U. S. 879....	16
Gadsden v. United States, 78 Fed. Supp. 126.....	16
Goodyear Tire & Rubber Co., Inc. v. United Motor Car & Supply Co., 103 Atl. 471.....	36
Harvey v. Harvey, 290 Fed. 653.....	13, 30
Holland v. Challen, 110 U. S. 15.....	10
Hyatt v. Colkins, 174 Cal. 580.....	10
Hynes v. Grimes Packing Co., 337 U. S. 86.....	28
Interstate Commerce Com. v. Louisville & Nashville R. Co., 227 U. S. 88.....	16, 23
Jaeger v. Simrany, 180 F. 2d 650.....	28
Jellenik v. Huron Copper Mining Co., 177 U. S. 1.....	13, 30
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123	20, 21, 32
Land v. Dollar, 330 U. S. 731.....	18, 20, 21, 23, 30, 31, 33
Londoner v. Denver, 210 U. S. 373.....	16, 23
Markall v. Bowles, 58 Fed. Supp. 463.....	16

	PAGE
McRoberts v. Independent Coal & Coke Co., 15 F. 2d 157.....	30
Morgan v. United States, 304 U. S. 1.....	16
Mount Carmel Public Utility & Service Co. v. Public Utilities Comm'r, 130 N. E. 693.....	15
Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294	16
National Radio School v. Marlin, 83 Fed. Supp. 169.....	29
Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U. S. 292	14, 16, 23
Pacific States Savings & Loan Co. v. Hise, 25 Cal. 2d 822.....	
.....	36, 43, 44, 45
People v. Commercial Alliance Ins. Co., 42 N. E. 1044.....	35, 36
Philadelphia Co. v. Stimson, 223 U. S. 605.....	33
Pickertl Schaeffer & Ebelring v. Merion, 66 N. E. 2d 273.....	36
Rank v. Krug, 90 Fed. Supp. 773.....	29
Reams v. Cooley, 171 Cal. 150.....	14
Reeber v. Rossell, 91 Fed. Supp. 108.....	29
Roberts v. Anderson, 66 F. 2d 874.....	39
Santa Fe P. Ry. Co. v. Fall, 259 U. S. 197.....	33
Scully v. Bird, 209 U. S. 481.....	33
Southern Pacific R. R. Co. v. Stanley, 49 Fed. 263.....	10
Southern Railway Co. v. Virginia, 290 U. S. 190.....	16
Standard Airlines v. Civil Aeronautics Board, 177 F. 2d 18.....	16
Stark v. Brannan, 82 Fed. Supp. 614.....	16
Title Insurance and Trust Co. v. California Development Co., 171 Cal. 173.....	12, 50
Twyman v. Smith, 161 So. 427.....	36
United States v. Lee, 106 U. S. 196.....	21, 23, 33
Varney v. Warehime, 147 F. 2d 238.....	29
Waite v. Macey, 246 U. S. 606.....	33
Watson v. Johnson, 24 P. 2d 592.....	35, 42
Williams v. Fanning, 332 U. S. 490.....	27, 30
Work v. Louisiana, 269 U. S. 250.....	33

STATUTES

PAGE

California Building and Loan Association Act (Stats. 1931, p. 483)	44
Deering's General Laws, Act 986.....	44
Federal Home Loan Bank Act (July 22, 1932, 47 Stat. 725) :	
Sec. 3	2
Sec. 12	21
Sec. 17	2
Sec. 25	2
Sec. 26	2, 14, 15, 22
Federal Rules of Civil Procedure, Rule 52(a).....	6
Judicial Code, Sec. 57	2, 8, 26, 30
United States Code, Title 12, Secs. 1421-1449.....	2
United States Code, Title 12, Sec. 1432.....	21
United States Code, Title 12, Sec. 1446.....	14
United States Code, Title 28, Sec. 118.....	2
United States Code, Title 28, Sec. 1291.....	3
United States Code, Title 28, Sec. 1655	2, 8, 26, 31
United States Constitution, Fifth Amendment.....	2, 17

TEXTBOOKS

89 American Law Reports, p. 1531.....	36
51 Yale Law Journal, pp. 1093, 1136, Davis, The Requirement of Opportunity to Be Heard in the Administrative Process....	17

No. 12591

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN H. FAHEY, *et al.*,

Appellants,

vs.

O'MELVENY & MYERS, W. I. GILBERT, JR., and RICHARD
FITZPATRICK,

Appellees.

and

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

O'MELVENY & MYERS, W. I. GILBERT, JR., and RICHARD
FITZPATRICK,

Appellees.

Brief of Appellees O'Melveny & Myers and Richard
Fitzpatrick (Counsel for Federal Home Loan Bank
of Los Angeles and Certain of Its Member Asso-
ciations).

This appeal is taken from an order [R. 1/288*] allow-
ing attorneys' fees on account to appellees above named
for services rendered to Federal Home Loan Bank of Los

*Denoting Volume I of the printed Record herein, page 288.

Angeles (hereinafter "Los Angeles Bank") and certain of its member associations, and to appellee W. I. Gilbert, Jr., for services rendered to First Federal Savings & Loan Association of Wilmington. The services in question were rendered in and with relation to the consolidated actions of *Federal Home Loan Bank of Los Angeles v. Federal Home Loan Bank of Portland* (hereinafter "San Francisco Bank"), etc., *et al.*, No. 5678-PH below, and *Mallonee, et al. v. Fahey, et al.*, No. 5441-PH below.

Jurisdictional Statement.

The complaint of Los Angeles Bank in Action No. 5678-PH (the so-called "Los Angeles action") and the cross-claim of that Bank in Action No. 5441-PH (the so-called Mallonee action) accurately described their respective natures as being, respectively, a complaint and cross-claim to enforce legal and equitable claims to, to obtain possession of and to remove liens from and clouds upon title to, property and for other and general relief. [12511 R. 20/9465-6*; 12511 R. 2/564.] Jurisdiction was invoked under the fifth amendment of the Constitution and under old Section 57 of the Judicial Code (then 28 U. S. C., Sec. 118, now 28 U. S. C., Sec. 1655) and under Sections 3, 12, 17, 25 and 26 of the Federal Home Loan Bank Act (July 22, 1932, 47 Stat. 725 *et seq.*, 12 U. S. C., Secs. 1421-1449); and the complaint (as did the cross-claim) alleged in terms that the activities complained of had operated to deprive Los Angeles Bank and its member shareholders of their property without due process of law,

*Denoting, pursuant to order, R. 2/875, Vol. XX, of printed Record in Appeal No. 12511 in this Court, pages 9455 and 9456. Other references to such Record will be similarly indicated.

to cast a cloud upon their title and other interests as to such property, and that the claims of the defendants with reference thereto were wholly without right. [12511 R. 20/9466, 9476, 9485, 9491-3.] It was also alleged that the matter in controversy exceeded, exclusive of interest and costs, the sum of \$45,000,000 as to the first (Los Angeles Bank) count and the sum of \$14,000,000 as to the second (the five member associations count). [12511 R. 20/9466, 9485-6.] The first count was, and the second count was not, duplicated in the cross-claim. The prayer in each of such pleadings was in the conventional form of an action *quasi in rem* to remove a cloud on title, to quiet title and to regain possession. [12511 R. 20/9493; *ibid.* 2/583.]

Appellants invoke the jurisdiction of this Court under 28 U. S. C., Section 1291.

Statement of the Case.

Although this appeal concerns the propriety of an interim allowance of attorneys' fees, an outline of the actual issues tendered by the complaint in the Los Angeles case (and duplicated in the Los Angeles cross-claim in the *Mallonee* action) will perhaps be helpful. The complaint in the Los Angeles case alleged in substance the following facts:

1. On March 29, 1946, the Los Angeles Bank was the owner or, in the alternative, the lawful holder and entitled to the possession of over \$45,000,000 of value in assets and properties. [12511 R. 20/9469.] It held some \$14,000,000 in value of securities pledged or deposited with it for safe-keeping by its member associations including the five appellee associations earlier mentioned

herein. [12511 R. 20/9485-6.] All of these assets and properties were in the State of California. [12511 R. 20/9476.]

2. On said date of March 29, 1946, defendant John H. Fahey, then purportedly acting as Federal Home Loan Bank Commissioner (since succeeded by appellant Home Loan Bank Board), without prior notice, hearing, or opportunity to be heard, arbitrarily and unlawfully seized the Los Angeles Bank and its assets, turned out its officers and purported to do each of the things specified in his purported orders Nos. 5082, 5083, and 5084 [12511 R. 20/9470-74], which orders provided in substance as follows:

a. *Order No. 5082*: Los Angeles Bank was to be liquidated and reorganized; its assets and properties were "hereby" transferred to the Portland Bank; the liabilities of the Los Angeles Bank were to be "assumed by" and were "hereby declared to be" liabilities of the Portland Bank; the president of the Portland Bank was authorized to sign documents in behalf of Los Angeles Bank; the members of the Los Angeles Bank were to become members of the Portland Bank; the Portland Bank was to be moved to San Francisco and to be thereafter known as the San Francisco Bank; the Portland Bank officers, directors, etc., were to act as such for the San Francisco Bank for the calendar year 1946 and the Portland charter was to govern the San Francisco Bank until "changed"; the San Francisco Bank was to operate branches at Portland and Los Angeles; (then followed further provisions for replacement of officers and directors, etc.).

b. *Order No. 5083*: The District of the Portland Bank was readjusted to include Arizona, California, Nevada and Hawaii; the Portland Bank was moved to

San Francisco and was thenceforth to be known as the San Francisco Bank.

c. *Order No. 5084*: The Los Angeles Bank was dissolved.

3. Orders Nos. 5082, 5083 and 5084 were published in the Federal Register; as a result of such orders, which defendants assert to be valid, defendants claim Portland (San Francisco) Bank to be the owner and entitled to the possession of the seized assets, which claim is wholly without right. [12511 R. 20/9475-6.]

4. Said orders and the things done under them operated to deprive Los Angeles Bank of its property without due process of law, constituted a trespass and a fraud in law upon its constitutional rights, and cast a cloud upon its rights, titles and interests as to the assets and properties in question. [12511 R. 20/9476.]

(The complaint then went on to charge in detail that the Commissioner's purported determination as to the necessity of seizing the Los Angeles Bank was untrue, sham and false and that in reality the seizure was the punitive culmination of a series of acts whereby the Commissioner had arbitrarily attempted to dominate the affairs of the Los Angeles Bank and to dictate to it as to who should fill an existing vacancy in its presidency. [12511 R. 20/9480-85.])

So far as the merits of this present appeal are concerned, a comparison of appellants' Specification of Errors (Br. p. 17) with the Findings of the District Court reveal that, among others, the following findings stand unchallenged upon this appeal:

1. That both the *Mallonee* and the *Los Angeles* actions, including the cross-claim of the Los Angeles Bank in the

Mallonee action, were commenced and at all times since have been prosecuted and maintained by plaintiffs therein and by cross-claimant Los Angeles Bank, through their respective counsel (including these appellees) in good faith and on reasonable grounds. [Findings 5 and 6, R. 1/291-3.]

2. On March 29, 1946, without notice, hearing or trial, the business, property and assets of Los Angeles Bank, in value some \$46,000,000, and as well property and assets of its shareholder and member associations held by it as pledgee, depositary, custodian, trustee, bailee or otherwise, were, without notice, hearing or trial, seized by defendant Fahey and turned over, without consideration and without corporate action on the part of Portland Bank,* to said Portland Bank, whose name was then changed to San Francisco Bank. Los Angeles Bank was then entirely solvent and had a surplus of approximately \$1,900,000. Said Los Angeles Bank was also, on said date of March 29, 1946, purportedly liquidated, consolidated and merged with Portland-San Francisco Bank and dissolved. Since said date Los Angeles Bank has been without property or assets with which to employ counsel. [Finding 7, R. 1/293-4.]

Appellants assign as "erroneous" (not, be it noted, as *clearly* erroneous: Fed. Rules of Civil Procedure, Rule 52 (a)) Findings 14, 15, 16, 17, 18 and 21 [R. 1/301-

*And, it is not disputed, without corporate action on the part of Los Angeles Bank.

304] dealing with the rendition of services by appellees inuring to the benefit of their respective clients and the class represented by the suing associations in Count II of the complaint in the Los Angeles action, the value of the services rendered by appellees O'Melveny & Myers and Richard Fitzpatrick (not, be it noted, the value of the services—substantially in excess of \$7,500—rendered by Mr. Gilbert) and the fact that the awards are interim in nature with no specific finding as to total value of services rendered.

Since, however, appellants mention none of these latter subjects either in the summary of their argument or in the argument itself, the conclusion is necessitated that these assignments are made only out of a super-abundance of caution and in aid of the points which they actually do discuss. From the standpoint of facts found, aside from their legal implications, it seems to be conceded that the value of the services rendered by O'Melveny & Myers and Richard Fitzpatrick was substantially [as found: R 1/303] in excess of \$67,500,* and that the services rendered by appellees including Mr. Gilbert inured to the benefit of their respective clients. In a word, appellants' Specification of Error No. 3 (Br. p. 18) seems to be aimed at the legal question of compensability and not to the evidentiary support of the facts found.

*Mr. Hubert Morrow testified as a qualified expert that the legal services rendered by O'Melveny & Myers and Richard Fitzpatrick were of the reasonable value of \$175,000. [R. 1/356.] There was no evidence as to the contrary.

Summary of Argument.

1. The Los Angeles action is not an action brought, as such, to review the actions of the commissioner evidenced by his Orders Nos. 5082, 5083 and 5084. It is, on the contrary, a plenary equity action *quasi in rem* brought under former Judicial Code, Section 57.* Therein the effect of the orders above referred to, which concededly constitute the sole muniments of title under which the San Francisco Bank claims, is drawn in question purely as an incident to the District Court's inquiry into title, ownership and the right to possession of the assets and properties constituting the *res* before the Court. In addition to this, and as an incident to its basic jurisdiction *in rem*, the Court has acquired jurisdiction *in personam* of the San Francisco Bank, the party in actual possession of the assets and properties in dispute.

2. The activities of the commissioner leading up to the seizure of the demanded assets and properties are subject to judicial scrutiny.

3. The contention of appellants that neither the Los Angeles Bank nor its member associations have any standing to question the validity of the orders of March 29, 1946, is devoid of merit.

4. The contention of appellants that the Home Loan Bank Board and its members are indispensable parties is devoid of merit; as is the contention that these are unconsented suits against the United States.

5. Under the plain provisions of 28 U. S. C., Section 1655, the District Court had and has plenary power and

*Now 28 U. S. C. §1655.

jurisdiction to hear and determine all questions material to the claim of Los Angeles Bank and its member associations that their respective titles to the assets and properties in dispute should be quieted, that clouds upon such titles should be removed and that possession of such assets and properties should be restored to their rightful owners.

6. Upon the case made by the pleadings in the actions below and by the findings in this proceeding, Los Angeles Bank is in precisely the same situation as is any corporation whose assets are seized by public authority in visitatorial proceedings.

a. In such a case, the corporation, acting in good faith, is entitled to its day in court to contest the validity of the seizure: and, irrespective of whether or not a case is ultimately made out for the interference of state or governmental authority, it is entitled to an allowance of fees to its attorneys. Otherwise, as the cases say, it would be hamstrung in any bona fide effort to defend itself.

7. Under such circumstances, an *interim* allowance of attorneys' fees is proper. The test is not that of ultimate success or failure in the litigation; it is whether or not the defense or the cause of action, as the case may be, is, as the District Court here found, conducted in good faith and on reasonable grounds.

8. The District Court did not err in directing payment of the attorneys' fees out of moneys in the registry of the court; and appellants' arguments to the contrary are moot and academic.

I.

The Los Angeles Action Is Not an Action Brought, as Such, to Review the Actions of the Commissioner Evidenced by His Orders Nos. 5082, 5083 and 5084. It Is, on the Contrary, a Plenary Equity Action Quasi in Rem Brought Under Former Judicial Code, Section 57. Therein the Effect of the Orders Above Referred to, Which Concededly Constitute the Sole Muniments of Title Under Which the San Francisco Bank Claims, Is Drawn in Question Purely as an Incident to the District Court's Inquiry into Title, Ownership and the Right to Possession of the Assets and Properties Constituting the Res Before the Court. In Addition to This, and as an Incident to Its Basic Jurisdiction In Rem, the Court Has Acquired Jurisdiction In Personam of the San Francisco Bank, the Party in Actual Possession of the Assets and Properties in Dispute.

Appellants' main thesis: that the Los Angeles action is brought to "review" the Commissioner's actions culminating in the seizure of the Los Angeles Bank's assets pursuant to Orders Nos. 5082, 5083 and 5084, exhibits nothing more than a studious attempt to misunderstand the true nature of the action.

A reading of the complaint makes it perfectly obvious that all of the elements of the conventional cause of action in equity by an owner out of possession* to quiet title, to remove a cloud on title and to regain possession are present. Ownership and right to possession in the Los An-

*Compare *Holland v. Challen*, 110 U. S. 15; *Southern Pacific R. R. Co. v. Stanley* (S. D. Cal.), 49 Fed. 263; *Hyatt v. Colkins*, 174 Cal. 580.

geles Bank down to March 29, 1946, deprivation of possession as of that date, an adverse claim under color of title (evidenced by the three orders as published in the Federal Register), plus the customary allegation that such claim is wholly without right, are all set forth.

So viewed, and correctly viewed, the Los Angeles complaint is open to neither of the interpretations which appellants seek to put upon it. The action is purely and simply an equitable action *quasi in rem* to try title as between one who alleges itself to be an owner out of possession—the Los Angeles Bank—and one who alleges itself to be an owner in possession—the San Francisco Bank. The later claims, as its sole muniment of title, the three administrative orders of March 29, 1946, and particularly Order No. 5082, the purported instrument of transfer. The question presented, therefore, is whether or not the orders in question did or did not operate to pass title to the disputed assets and properties; a question which is present, generally as regards a deed or other instrument under which the defendant claims, in any quiet title suit or action to remove a cloud on title.

This is certainly a question which the District Court has jurisdiction to determine, whether its ultimate decision be right or wrong. And the decision of this question calls for no species of *review* of the administrative orders, in the sense in which appellants use the term. The question is, not whether the orders should be set aside, in the administrative sense, but whether they, and particularly Order No. 5082, operated to transfer title to the San Francisco Bank. It is the contention of the latter that the orders did have this effect. It is the contention of the Los Angeles Bank that they did not; that from the standpoint of legal title the orders had no more effect than would a

wild deed, executed in favor of the San Francisco Bank by a third party (here the Commissioner) not connected with the title. These are questions for the District Court to determine, along with the other questions which appellants raise on this appeal, and none of which go to the *jurisdiction* of the District Court. *All* of these questions go to the merits of the key question below, which is: Did or did not the orders in question pass title to the demanded assets and properties? And it is certainly a novel experience to the writers of this brief that an appellate court should be asked to decide this question in advance of a trial on the merits.

Appellants seem to lay stress upon the fact that the prayer in the Los Angeles complaint asks that the orders in question be declared to be null and void and that any clouds or liens created thereby be removed. This is no more than would be prayed as to any wild deed or other instrument clouding or otherwise affecting a valid title. It certainly does not call for a setting aside of the orders as in the case of an administrative review.

However, and in any event, and without expressing any further opinion upon the subject, if it should appear that such relief as prayed goes too far, it is nevertheless obvious that this particular objection relates merely to the form of the decree to be rendered. The District Court, having jurisdiction *in personam* over the San Francisco Bank, has plenary power to adjudicate the San Francisco Bank a constructive trustee and order it to return the demanded assets and properties without in any way touching the orders in question. Such action would clearly be within the powers of a court of equity, in a proceeding *quasi-in rem*. (*Title Insurance and Trust Co. v. California Development Co.*, 171 Cal. 173, 198-199.)

Such relief *in personam* would be purely in aid of and incidental to the exercise of the court's jurisdiction *in rem* over the assets and properties themselves. (*Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1; *Harvey v. Harvey* (7 Cir.), 290 Fed. 653.)

The true nature of the incidental powers of the court in an action of this type is excellently set forth in *Harvey v. Harvey*, *supra*, where the court said:

“Appellant's contention that the injunction granted relief *in personam* and therefore cannot be based upon service under Section 57, which applies to actions *in rem*, is not well founded. This suit is in the nature of a suit to quiet title to personal property within jurisdiction of the court. The court has in its custody the *res*. It puts out its protecting hand and says to the defendants that the plaintiff claims the *res*; that pending the determination of that claim the *statu quo* shall be maintained and the defendants restrained from using the *res*; that if they desire to contest the claim of the plaintiff to this property they shall come into court and do so. Incidental to its jurisdiction over the *res*, the court may use its power of injunction not to prevent distinctly personal acts by the defendants disconnected with the *res*, but to prevent the defendants interfering with, disposing of, converting, injuring, or wrongfully using the *res*.” (290 Fed. at p. 659.)

Therefore, contrary to appellants' views upon the subject, the orders of March 29, 1946, are involved in the Los Angeles action only as an incident to a determination by a court of equity having jurisdiction over a specific *res*, of title and right to possession of that *res*.

II.

The Activities of the Commissioner Leading Up to the Seizure of the Demanded Assets and Properties Are Subject to Judicial Scrutiny.

Section 26 of the Federal Home Loan Bank Act, as amended, 12 U. S. C., Section 1446, under which the Commissioner purported to act in seizing the demanded assets, confers a power and prescribes a procedure for the liquidation or reorganization of a federal home loan bank. Among other things, the Commissioner (the Commissioner succeeded to the powers of the Federal Home Loan Bank Board under Executive Order No. 9070) must make a finding; and he must also pay off and retire the outstanding stock of the bank, in whole or in part. Appellants argue that as a matter of statutory construction, the court should imply from the Act that the Commissioner was given final and absolute discretion in dissolving and reorganizing a bank, without any right of judicial review whatever. Granting the power to liquidate *or* reorganize, the procedure therefor is set forth in the statute and must be followed. (*Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U. S. 292, 304.) This process expressly included paying off and retiring the stock of the bank in whole or in part. This process, the Los Angeles complaint alleges (and we do not understand the fact to be disputed), was not followed here. And it is as true of the Commissioner as of any other administrative agency that where, as here, a particular mode of exercising a power is conferred by law, *the mode is the measure of the power*. (*Reams v. Cooley*, 171 Cal. 150; *Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691.) The question of whether the Commissioner did or did not exercise his power in the mode prescribed is of course a *judicial* question; which of course means a question reviewable by a *court*.

Section 26 also requires a *finding* of efficiency and economy in the accomplishment of the purposes of the Act. The Commissioner here made no *finding* whatever. He did make a purported *determination* that the efficient and economical accomplishment of the purposes of the Act would be aided by his contemplated action. (Order No. 5082.) It is obvious that a *finding*, as required by the statute, imports a hearing, based upon evidence, before any “determination” or other decision may be arrived at. A “finding” of the existence of certain facts presupposes some hearing of evidence tending to prove such facts. (*Abraham v. Daugherty*, 60 Cal. App. 297, 302; *California Employment Comm’r v. Malm*, 59 Cal. App. 2d 322, 324; *Mt. Carmel Public Utility & Service Co. v. Public Utilities Comm’r* (Ill.), 130 N. E. 693, 696.)

The fact that the Commissioner purported to make a “determination” rather than the finding which the statute prescribes is in itself persuasive evidence that he was unable to find, *from evidence*, any *facts* which would have supported his determination; and, of course, it is not open to dispute that the Commissioner acted without affording the Los Angeles Bank or its members any notice or hearing whatever. But again, the question of whether the Commissioner did or did not make a finding and, if so, whether such finding was supported by evidence, are *judicial* questions, as is the further question, tendered by the Los Angeles complaint, that the Portland Bank did not *acquire* the assets of the Los Angeles Bank, with the approval of the Board, as the Act provides, but that instead the Los Angeles assets were thrust upon the Portland Bank by the Commissioner without any affirmative corporate action whatever by either bank.

Furthermore, under general principles of jurisprudence the right of appeal to the courts in the case of administrative action of an arbitrary or capricious nature which as here, directly affects property rights is established. (*Markall v. Bowles*, 58 Fed. Supp. 463 (D. C., N. D., Cal.).) Under such circumstances Federal courts will read the requirements of due process into the Act, and due process means a hearing; therefore, a hearing is an integral part of the Federal Home Loan Bank Act, just as much as if the Act itself in words stated that a hearing should be held. (*Cf.*, *Eisler v. Clark*, 77 Fed. Supp. 610 (D. C., D. C.) *cert. denied*, 338 U. S. 879.) In many cases it has been held that where discretion is conferred on an administrative officer to render a decision, this decision must be honestly rendered, and if it is arbitrary or capricious, or rendered in bad faith, the courts have power to review it and set it aside. (*Gadsden v. United States*, 78 Fed. Supp. 126 (Ct. Claims); *Southern Railway Co. v. Virginia*, 290 U. S. 190, 194 *et seq.*; *Londoner v. Denver*, 210 U. S. 373, 386; *Standard Airlines v. Civil Aeronautics Board*, 177 F. 2d 18, 20 (D. C. Cir.); *Stark v. Brannan*, 82 Fed. Supp. 614, 617 (D. C., D. C.).)

The test seems to be this: That if an administrative agency merely *advises*, a hearing in the due process sense may not necessarily be required; but where, as here, the agency *ordains*, in such a manner as to impinge upon property rights, a due process (which means a *full and fair*) hearing is required at the administrative level in order to facilitate attendant judicial review. (*Norwegian Nitrogen Products Co. v. U. S.*, 288 U. S. 294, 318-319; *Morgan v. U. S.*, 304 U. S. 1; *I. C. C. v. L. & N. R. Co.*, 227 U. S. 88; *Ohio Bell Telephone Co. v. Public Utilities Com.*, 301 U. S. 292.)

There can certainly be no question here but that the Commissioner *ordained* here. He ordained that \$45,000,000 of assets lawfully owned or possessed by the Los Angeles Bank should, by mere official *fiat*, be transferred to the Portland Bank. That his ordainment impinged upon the property rights of both the Los Angeles Bank and its depositor or pledgor members is self-evident. Under these circumstances, appellants' argument, that neither the bank nor its members' property rights were affected by the seizure, wholly fails to stand scrutiny.

The basic principle is that due process requirements are satisfied *if, and only if, at any time before governmental action with reference to property rights becomes final, hearings are allowed either by administrative or by judicial action*. Davis, "The Requirement of Opportunity to Be Heard in the Administrative Process," 51 Yale Law Journal 1093, 1136 (1942). It is conceded that the Los Angeles Bank received no hearing at the administrative level. It is therefore entitled to it *now*, when the matter is pending before a *court*. Otherwise, it is respectfully submitted, the plain mandate of the Fifth Amendment will have been violated. This means that the District Court is empowered, as a matter of due process of law, to scrutinize the activities of the Commissioner here complained of, in addition to its plenary jurisdiction in equity to adjudicate title and the right to possession to the assets and properties over which it has acquired jurisdiction.

What has been said above should dispose of the contention that the activities of the Commissioner are not subject to judicial review. Such a plea in the face of the charge of arbitrary action directly affecting the prop-

erty rights of the plaintiffs in the Los Angeles action simply cannot be justified. And this is particularly true where, as in the pattern of the Federal Home Loan Bank Act, no administrative review is provided. This merely means, in the eyes of equity, that no adequate remedy at law has been provided for the protection of the property rights of those plaintiffs against arbitrary action; in itself, a valid ground of equity jurisdiction.

Baldly stated, the position of appellants seems to be that no justiciable question is presented by the fact that a public officer has seized the property of a private person in a manner not authorized by the statute under which he purports to act.

This position is belied by all of the authorities. As said in *Land v. Dollar*, 330 U. S. 731:

“If respondents are right in these contentions, their claim rests on their right under general law to recover possession of specific property wrongfully withheld. At common law their suit as pledgors to recover the pledged property on payment of the debt would sound in tort.

“If viewed in that posture, the case is very close to *United States v. Lee*, 106 U. S. 196. That was an action in ejectment to recover possession of a tract of land. The defendants were military officers who, acting under orders of the President, took possession of the land and converted one part into a fort and another into a cemetery. For the lawfulness of their possession they relied on a tax sale of the property to the United States. On the trial it was held that the claim of the plaintiffs to the land was valid and that the defendants were wrongfully in possession. The Court affirmed the judgment over the objection that the suit was one against the

United States. It held that the assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action; that a determination of whether their 'authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.' P. 219. It further held that while such an adjudication is not *res judicata* against the United States because it cannot be made a party to the suit, the courts have jurisdiction to resolve the controversy between those who claim possession. And it concluded that an agent or officer of the United States who acts beyond his authority is answerable for his actions. And see *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619-620; *Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U. S. 549, 567.

"Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States v. Lee*, *supra*, has been repeatedly approved. *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446, 452; *Tindal v. Wesley*, 167 U. S. 204; *Smith v. Reeves*, 178 U. S. 436, 439; *Scranton v. Wheeler*, 179 U. S. 141, 152-153; *Philadelphia Co. v. Stimson*, *supra*, pp. 619-620; *Goltra v. Weeks*, 271 U. S. 536, 545; *Ickes v. Fox*, 300 U. S. 82, 96; *Great Northern Life Ins. Co. v. Read*, 322 U. S. 47, 50-51. That rule is applicable here although we assume that record title to the shares is in the Commission. In *United States v. Lee*, *supra*, record title of the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. . . ." (330 U. S. at pp. 736-737.)

What appellants overlook is the patent fact that if the Commissioner exceeded his statutory authority in seizing the property of the Los Angeles Bank, he and his confederates were nothing other than tort-feasors. As also said in *Land v. Dollar*:

“ . . . But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen’s realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.

“It is in the latter category that the pleadings have cast this case. That is to say, if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers, . . .”
(330 U. S. at p. 738.)

Appellants mention, and vainly attempt to distinguish the recent holding of the Supreme Court in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. It is said that in that case justiciability was found to consist of an alleged injury to a legally protected right, *i. e.*, the right to be free from defamatory statements. By just what species of reasoning appellants arrive at the conclusion that the right to hold and deal in property free from unwarranted interference and spoliation under color of governmental authority is not a legally protected right, is not made clear.

Under Section 12 of the Act (12 U. S. C., Sec. 1432), federal home loan banks, such as the Los Angeles Bank, are empowered "*to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; . . .*"* To assert, as appellants do assert, that such power may not be invoked to protect the bank's property from unwarranted seizure, would render the right to sue and to defend an empty one indeed.

As a matter of fact, the case made on the pleadings by the Los Angeles Bank and the member associations joining with it, falls precisely within the pattern of such cases as *United States v. Lee* and *Land v. Dollar*. Here, as there, a specific *res* or property (the property and assets, plus their derivatives, of the Los Angeles Bank as of March 29, 1946) is claimed to be withheld. Here, as there, the right to possession or enjoyment of property under general law is in issue. Here, as there, the assertion by officers of the Government of their authority to act does not foreclose judicial inquiry into the lawfulness of their action. And, last but not least, the determination of whether their authority is rightly assumed is the exercise of jurisdiction *and must lead to the decision of the merits of the question*; in other words, *the District Court had and has jurisdiction to determine its own jurisdiction by proceeding to a decision on the merits*.

The short of it is that appellants' contentions that the Commissioner's activities are not subject to judicial scrutiny are devoid of merit. There being present here, as there was in the *Joint Anti-Fascist* case, a legally pro-

*Emphasis here, as elsewhere, is supplied unless otherwise noted.

tected right, the following language from that decision has full applicability here:

“ . . . The order contains the express requirement that each designation of an organization by the Attorney General on such a list shall be made only after an ‘appropriate . . . determination’ is prescribed in Part III, Sec. 3. An ‘appropriate’ governmental ‘determination’ must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of ‘determination.’* It is implicit in a government of laws and not of men. Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it.” (341 U. S. at p. 136.)

* * * * *

“Since we find that the conduct ascribed to the Attorney General by the complaint is patently arbitrary, the deference ordinarily due administrative construction of an administrative order is not sufficient to bring his alleged conduct within the authority conferred by Executive Order No. 9835. The doctrine of administrative construction never has been carried so far as to permit administrative discretion to run riot. . . .” (341 U. S. at pp. 137-138.)

* * * * *

“11. The designation of these organizations was not preceded by any administrative hearing. The organizations received no notice that they were to

*It will be recalled that here the Commissioner purported to make a “determination” in Order No. 5082, as distinguished from the *finding* required by Section 26 of the Act, and appellants’ brief (p. 39) concedes the fact that no “formal” findings were made.

be listed, had no opportunity to present evidence on their own behalf and were not informed of the evidence on which the designations rest. See *Chin Yow v. United States*, 208 U. S. 8." (341 U. S., Footnote at p. 138.)

It is said that the action of the Commissioner in seizing the Los Angeles assets was quasi-legislative in nature. But an agency exercising quasi-legislative functions has no more power to deprive a person of property without due process of law than has any one else. (*Londoner v. Denver*, 210 U. S. 373, 385-6; *Interstate Commerce Com. v. Louisville & Nashville R. Co.*, 227 U. S. 88; *Ohio Bell Telephone Co. v. Public Utilities Com.*, 301 U. S. 292.)

In saying this, we are not to be understood as implying that we agree that the Commissioner was acting quasi-legislatively, as appellants contend. He was, in our judgment, acting administratively insofar as he stayed within the framework of the Act. When he exceeded his statutory authority, *and such is the charge here*, he became a mere tort-feasor whose purported transfer of the assets to the San Francisco Bank did not and could not operate to vest ownership in that bank. Whether he did or did not act in derogation of his powers under the Act is the question to be tried below; and under the doctrine of cases such as *United States v. Lee* and *Land v. Dollar*, the question of the jurisdiction of the District Court may only be determined after a trial on the merits. Appellants may meet the charges, but they cannot evade them.

III.

The Contention of Appellants That Neither the Los Angeles Bank nor Its Member Associations Have Any Standing to Question the Validity of the Orders of March 29, 1946, Is Devoid of Merit.

The contention of appellants in this regard seems to be predicated upon the theory, already commented upon herein, that the seizure of March 29, 1946, affected neither the property rights of these appellees nor their rights to be protected against tortious invasion. In the light of the allegations of the Los Angeles complaint, to state appellants' contention is to answer it. As we have seen, the complaint directly charges a tortious invasion of the property rights both of the Los Angeles Bank (rights of a value of \$45,000.00), and of its member associations (rights valued at \$14,000.00). Whether there was such an invasion and whether the same were tortious, were and are questions for the District Court to determine in the exercise of its jurisdiction to try title to the demanded assets. The charge was and is *conversion* as to personal property and *trespass* as to realty; it is respectfully urged that an assertedly sacrosanct administrative agent has no more right to commit torts of this nature, under color of official rectitude, than any other person.

The plain fact is that irrespective of how or for what reason the Los Angeles Bank was created, as soon as it acquired *property* in the course of its operations, it could only be deprived of that property through procedures

which satisfy the requirements of due process of law. (Compare *In re Carter*, D. C. Cir., 177 F. 2d 75, 77-8.)

As for the purported "dissolution" of the Los Angeles Bank, this is, of course, but part and parcel of the arbitrary attempt to denude it of its properties. Even the orders of March 29, 1946, recognize that before a Federal Home Loan Bank may be "dissolved," some attempt must be made (a) to dispose of its assets, and (b) to take care of its stockholders. Here the charge is that *neither* of these conditions precedent were lawfully carried out. The entire procedure embodied in the three orders is, therefore, subject to judicial scrutiny in the Los Angeles action in the course of trying title to the seized assets.

It is subject to examination in two aspects: (1) in the right of the Los Angeles Bank itself, and (2) in the right of appellee member associations.

And it is not to be overlooked that it is the latter to whom, even in the impossible event of a valid dissolution without a proper disposition of the Bank's assets, would descend the right of recovering those assets or, in the alternative, protecting them from spoliation. Appellants may not, therefore, avoid a judicial review of the activities of March 29, 1946, on any specious plea that the Los Angeles Bank no longer exists as a corporate entity; a plea which, to the credit of appellants, they do not stress, and which, if they did stress it, would merely point up the fact that in any event the District Court has jurisdiction to try title to the seized assets at suit of the member associations.

IV.

The Contention of Appellants That the Home Loan Bank Board and Its Members Are Indispensable Parties Is Devoid of Merit, As Is the Contention That These Are Unconsented Suits Against the United States.

Here again we find appellants ignoring the true nature of the *Los Angeles* action. It is Hornbook law that where a court has jurisdiction *in rem* or *quasi-in rem*, the principal function of the process of the court is to apprise parties having or claiming an interest in the *res* of the controversy in reference thereto, in order that they may appear, *if they so desire*, and protect their interests. And, under the pattern of old Judicial Code, Section 57 (28 U. S. C., Sec. 1655), absent defendants may be served by substituted process, which was here done in the case of Commissioner Fahey. Upon service thus being made, Commissioner Fahey had the right to appear or not, as he chose. He appeared by various motions, attacking jurisdiction both of the subject matter and over his person. His successor, the Home Loan Bank Board, has heretofore answered as to the merits while at the same time attempting to preserve the jurisdictional points.

For the purposes of jurisdiction of the District Court over the *Los Angeles* case, it is manifestly of no moment whether Fahey or the Board actually appeared or not. 28 U. S. C., Section 1655 provides (as did Judicial Code, Section 57 before it) that where the absent defendant does not, after substituted service, appear, the adjudication shall, as to him, "affect only the property which is the subject of the action."

It is only such a decree—one affecting only the property which is the subject of the action—which is sought

in the *Los Angeles* phase of the litigation. The prayer is that the assets and properties be recovered, that title in appellees be quieted and confirmed, and that any cloud occasioned by the three orders be removed.

In other words, so far as Commissioner Fahey and his present successor are concerned, the jurisdiction of the District Court to adjudicate title and right to possession of the demanded properties and assets attached at the moment service was made upon the late Commissioner. *Whether he was an indispensable party to this controversy or whether he was not, the District Court obtained jurisdiction then and there to adjudicate his claims, if any, with reference to the assets.*

Repeated decisions of the Supreme Court indicate, however, that neither Fahey nor the Home Loan Bank Board were or are indispensable parties to this controversy over title and right to possession of the seized Los Angeles Bank assets. The test, as laid down by the Supreme Court is whether or not the decree may be said to be capable of expending itself against the subordinate of the governmental agency involved; here, of course, the San Francisco Bank.

In *Williams v. Fanning*, 332 U. S. 490, the court held that the Postmaster General was not an indispensable party in an action brought to enjoin the local postmaster from carrying out a postal fraud order issued by the postmaster general after a hearing. The court cited authority for the proposition that a superior is an indispensable party if the decree granting the relief sought would require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. It was held that the postmaster gen-

eral was not indispensable because the decree entered would effectively grant the relief desired *by expending itself on the subordinate official* who was before the court.

“The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutger* case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command.” (P. 494.)

Similarly, in the present case, the decree will effectively grant the relief desired by expending itself on the San Francisco Bank, which is before the court and is in actual possession of the disputed assets. All that the court is asked to command is the reconveyance of the property and assets wrongfully and arbitrarily seized from the plaintiffs, accounting with reference to said assets and properties in the plaintiffs. None of this requires concurrence on the part of the Federal Home Loan Bank Board or any other non-resident defendant. The decree in order to be effective need not require the Board to do a single thing, either directly or indirectly.

Further illustrating that the Federal Home Loan Bank Board is not an indispensable party to this action are the following: *Hynes v. Grimes Packing Co.*, 337 U. S. 86. 96 (Secretary of the Interior not an indispensable party to a suit to enjoin the exclusion of commercial fishermen from shore line waters designated as an Indian Reservation by the Secretary, on the ground of the invalidity of the Secretary's order and regulation); *Jaeger v. Simrany*, 9 Cir., 180 F. 2d 650, 651 (Commissioner of immigration

not an indispensable party to a suit for declaratory judgment and injunction against a local immigration officer, to prevent him from proceeding to cancel the record of registry and a certificate of lawful entry of an alien); *Rank v. Krug* (D. C. S. D., Cal.), 90 Fed. Supp. 773, 802 (Secretary of the Interior and the United States not indispensable parties to a class suit to enjoin interference with plaintiff's water rights by reason of erection of dam under Federal Reclamation Laws); *Reeber v. Rossell* (D. C. N. Y.), 91 Fed. Supp. 108, 111 (Administrator of Veterans Affairs and Chairman of Civil Service Commission not indispensable parties in an action for declaratory judgment that the Administrator's order was null and void as against the plaintiffs); *National Radio School v. Marlin* (D. C., Ohio), 83 Fed. Supp. 169, 170 (Administrator of Veterans Affairs not indispensable party to suit to enjoin local veterans' finance officer and others from withholding issuance of vouchers for veterans' tuition). The Court of Appeals for the Sixth Circuit expressed the guiding principles in *Varney v. Warehime*, 147 F. 2d 238, as follows:

“Matters of convenience and necessity are entitled to consideration. Citizens should not be compelled to seek a distant forum for litigation of their controversies with the Government, and likewise, public officials should not be compelled to neglect their duties to answer charges of usurpation of power in a distant forum.

“Approaching the subject from a practicable standpoint, we need not overlook the fact that the question of constitutionality or statutory power of a public

official is usually a question of law, and may be determined in any appropriate forum without the personal presence of the superior government official.

“The right of intervention is available to a superior official in any suit where his subordinate is made a party defendant. Governmental regulations under present circumstances are so widespread and affect such a vast number of our people that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question if the officer before the court is such an agent in the matter involved that it is reasonable to proceed to an adjudication of the issue with finality.”

It therefore follows that neither Fahey nor the Federal Home Loan Bank Board were or are indispensable parties to this action; but in any event, as we have pointed out, the jurisdiction of the District Court to adjudicate title and the right to possession of these assets under Section 57 of the Judicial Code, as far as Fahey or the Board were or are concerned, attached immediately when substituted service on Fahey was completed, whether he was an indispensable party or not. (Compare *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1; *Harvey v. Harvey*, 7 Cir., 290 Fed. 653; *McRoberts v. Independent Coal & Coke Co.*, 8 Cir., 15 F. 2d 157.)

What we have said above also answers appellants' kindred contention that the Los Angeles suit is an action against the United States. It is no more such than were *Land v. Dollar*, *Williams v. Fanning*, or the other cases cited above to show that neither Fahey nor the Board were or are indispensable parties.

V.

Under the Plain Provisions of 28 U. S. C., Section 1655, the District Court Had and Has Power and Jurisdiction to Hear and Determine All Questions Material to the Claim of Los Angeles Bank and Its Member Associations That Their Respective Titles to the Assets and Properties in Dispute Should Be Quieted, That Clouds Upon Such Titles Should Be Removed and That Possession of Such Assets and Properties Should Be Restored to Their Rightful Owners.

28 U. S. C., Section 1655 is the federal expression of the conventional type of action to determine conflicting rights or claims as to real or personal property within the jurisdiction upon the basis of substituted service upon parties outside the jurisdiction. Appellants do not question the constitutionality of Section 1655, nor do they question the fact that acting under its provisions, a District Court has plenary jurisdiction to adjudicate titles, rights and interests in property.

Such being the case, Section 1655 is clearly a vehicle whereby under general law, within the meaning of the cases typified by *Land v. Dollar*, a party may litigate his claims to specific property. Such being the case, *Land v. Dollar* and its prototypes stand as authority for the proposition that any and all questions germane to the Los Angeles Bank's claim to its seized assets and properties may be litigated in the Los Angeles action and in the Los Angeles Bank cross-claim in the *Mallonee* action.

Appellants choose to ignore the plain language of Section 1655 and the holdings in cases of the *Land v. Dollar*

type, and insist that this is some type of review proceeding; and they say that the actions of the Commissioner are not reviewable.

In this they are in error in two different respects. In the first place, their claim to non-reviewability is belied by decisions such as that in the *Joint Anti-Fascist Committee* case cited above; cases which hold that the activities of public officers in excess of their authority may be scrutinized by the courts in any appropriate proceeding. We quote from the *Anti-Fascist* decision:

“The respondents are not immune from such a proceeding. Only recently, this Court recognized that ‘the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff’s property) can be regarded as so “illegal” as to permit a suit for specific relief against the officer as an individual . . . if it is not within the officer’s statutory powers or, if within those powers . . . if the powers, or their exercise in the particular cases are constitutionally void.’ *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 701-702. The same is true here, where the acts complained of are beyond the officer’s authority under the Executive Order.” (341 U. S. at p. 140.)

In the second place, this is not a review proceeding in the sense in which appellants use the term. It is, as we have pointed out, an action (we speak also of the cross-claim of the Los Angeles Bank in the *Mallonee* case) to quiet title to, to remove clouds from, and to regain possession of specific property. Here the administrative Orders, No. 5082, 5083 and 5084 amount to no more than the muni-

ments of *title* under which the San Francisco Bank claims the disputed assets. So far as this case is concerned, the orders in question are no more than purported *conveyances*; and certainly in a quiet title suit the court is fully empowered to adjudicate the validity of an asserted conveyance under which the defendant claims.

In this connection, it will have been noted that from time to time in appellants' brief the assertion is made that the actions below are "collateral" attacks upon the Commissioner's administrative orders. (We pass over the question of the inconsistency of this contention when compared with their other assertion that his orders cannot be reviewed at all.) Suffice it to say that in *any* action where a governmental officer, as here, acting in excess of his statutory authority, commits a common law tort (here trespass and conversion), he may not hide behind the governmental immunity and the courts are open to the despoiled party. (*U. S. v. Lee, supra*; *Land v. Dollar, supra*; and see *Scully v. Bird*, 209 U. S. 481; *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U. S. 280; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Waite v. Macey*, 246 U. S. 606; *Santa Fe P. Ry. Co. v. Fall*, 259 U. S. 197; *Work v. Louisiana*, 269 U. S. 250.)

The result is that to the extent that the scrutiny of the court below in this quiet title and possessory action is devoted to a consideration of the validity of the three orders to pass title or a right to possession as regards the Los Angeles Bank assets, the impact of the action upon the orders in question is certainly not collateral. It is

direct and immediate. But, as we have indicated elsewhere, the jurisdiction in these actions springs, not from any review power as such, but from the plenary power of a court of equity to try title, remove clouds, adjudicate the right to possession and enjoin the assertion of unfounded claims.

This situation is further pointed up by the fact that the answer of the San Francisco Bank admits that it claims the disputed assets solely under and by virtue of the three administrative orders, Nos. 5082, 5083, and 5084, above referred to; in other words, the sole muniments of title upon which it relies in this action *quasi-in rem* to quiet title, to remove clouds on title and to regain possession, are these three administrative orders. [12511 R. 9/4058, 4060-61, 4062-63, 4064-65, 4066, 4071, 4078-9, 4088.]

There is thus squarely presented for consideration in this quiet title suit, the question of whether these three orders (or for that matter, any one of them), did or did not operate to pass title and the right to possession of the disputed assets from the Los Angeles Bank to the San Francisco Bank. This question—whether a given instrument or instruments operated to transfer title to a given grantee—is a time honored and key issue which is always present in a quiet title suit. And *Land v. Dollar* and its companion cases are direct authority for the proposition that this question can only be decided on the merits. This means that the action must be tried, which in turn brings us to the question of the propriety of the award of attorneys' fees prior to trial by reason of services found to have been rendered in an action brought in good faith and on reasonable grounds.

VI.

Upon the Case Made by the Pleadings in the Actions Below and by the Findings in This Proceeding, Los Angeles Bank Is in Precisely the Same Situation as Is Any Corporation Whose Assets Are Seized by Public Authority in Visitatorial Proceedings.

- A. In Such a Case, the Corporation, Acting in Good Faith, Is Entitled to Its Day in Court to Contest the Validity of the Seizure; and, Irrespective of Whether or Not a Case Is Ultimately Made Out for the Interference of State or Governmental Authority, It Is Entitled to an Allowance, Out of the Seized Assets, of Fees to Its Attorneys; Otherwise, as the Cases Say, It Would Be Hamstrung in Any Bona Fide Effort to Defend Itself.

The application of the Los Angeles Bank for an allowance of attorneys' fees was based upon those principles which are applicable in any case where a corporation which has been deprived of its assets opposes receivership or dissolution proceedings. Appellants are pleased to call this the "receivership" theory.

In such cases, it is well settled that where the resistance is made in good faith and on reasonable grounds (which the District Court found to be the facts here) an allowance of attorneys' fees out of the corporation's assets in the hands of the receiver or other custodian is within the discretion of the court, irrespective of whether the corporation's efforts are ultimately successful or not. (*Barnes v. Newcomb*, 89 N. Y. 108 (probably the leading case); *People v. Commercial Alliance Ins. Co.* (N. Y.), 42 N. E. 1044; *Anderson v. Great Republic Life Ins. Co.*, 41 Cal. App. (2d) 181 (rule stated); *Watson v. Johnson* (Wash.), 24 P. 2d 592; *Assets Realization Co. v. Defrees* (Ill.), 80 N. E. 263; *Goodyear Tire & Rubber Co.*,

Inc. v. United Motor Car & Supply Co. (N. Y.), 103 Atl. 471; *Pickerl Schaeffer & Ebelring v. Merion* (O. App.), 66 N. E. 2d 273; *Twyman v. Smith* (Fla.), 161 So. 427; *Pacific States Savings & Loan Co. v. Hise* (rule stated), 25 Cal. 2d 822; *Caminetti v. State Mutual Life Ins. Co.*, 52 Cal. App. 2d 326 (rule stated); and see note, 89 A. L. R. 1531; and compare *Eggert v. Pacific States Savings & Loan Co.*, 53 Cal. App. 2d 554.)

And it is worthy of note that, in receivership proceedings, an allowance of attorneys' fees by the court is a *preferred* claim against the assets of the corporation in the hands of the receiver. (*Barnes v. Newcomb, supra*; *Goodyear Tire & Rubber Co., Inc. v. United Motor Car & Supply Co., supra*; and see *People v. Commercial Alliance Inc., Co., supra*.)

The principle is akin to that which permits an allowance out of the corpus of a trust where the trustee defends against an attack upon the trust. (*Dingwell v. Seymour*, 91 Cal. App. 483; *Eggert v. Pacific States Savings & Loan Co., supra*.)

The rule and the reasons for its existence are well stated in the *Goodyear* case:

"Application is not made under the provision of the statute providing for the payment of employees, but is based upon the inherent power of the court to direct paid, as a preferred claim, a reasonable sum for compensation of counsel employed by the corporation in good faith to defend the corporate existence of the company. I think the power exists. High on Receivers (4th Ed.) 439; *Barnes v. Newcomb*, 89 N. Y.

108; *People v. Commercial Alliance Ins. Co.*, 148 N. Y. 563, 42 N. E. 1044. I adopt the language of the Court of Appeals in the latter case:

“ ‘The case of *Barnes v. Newcomb*, 89 N. Y. 108, is an authority for the proposition that a court of primary jurisdiction, in the exercise of its discretion, may authorize the receiver of an insolvent corporation, appointed in an action brought for its dissolution, which was defended in good faith by the corporation, though unsuccessfully, to pay as a preferred claim out of the fund in his hands a reasonable sum for the compensation of counsel employed by the corporation in defending the action. The principle upon which an allowance in such case may be made is that counsel fees are in the nature of expenses incurred by the corporation and its trustees in the protection and preservation of the trust which they represent; and, even if it turns out that a case is made for the interference of the state, so long as the defense was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and fund involved in the litigation to expenses incurred in discharging a general duty cast upon the corporation and its trustees, to take all reasonable means for its protection.’ ” (103 A. at p. 471.)

The above principles were followed in California by *Anderson v. Great Republic Life Ins. Co.*, *supra*, where the court stated:

“ . . . Neither party has cited any California authority in point and a search fails to reveal a California case on the question. However, there appears to be nothing in California law, statutory or otherwise, which precludes an application of the rule laid down in *Barnes v. Newcomb*, *supra*, and enunciated in *Watson v. Johnson*, 174 Wash. 12 (24 Pac. (2d)

592), 89 A. L. R. (1527), the latter cited by respondent. That rule may be summarized as follows:

“It is a general rule that where an application has been made for the appointment of a receiver for a corporation, attorneys’ fees and expenses in resisting such application, if made in good faith and upon reasonable grounds, may become a valid claim against the receiver. Whether such attorneys’ fees and expenses are to be allowed rests in the sound discretion of the court, in view of all the facts and circumstances (Note, 89 A. L. R. 1531). If allowed, the question as to the amount thereof is likewise addressed to the sound discretion of the court. The claim of the officers of a corporation or of attorneys employed by them to be paid out of the funds in the hands of the receiver is not an absolute right, but it is entirely in the discretion of the court administering the fund to determine, first, the good faith and justification for such application, and second, if warranted, the amount to be allowed. (*Esarey v. Pierson*, 84 Ind. App. 109 (141 N. E. 87).) ‘Even if it turns out that a case is made for the interference of the state, so long as the defense was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and fund involved in the litigation to expenses incurred in discharging a general duty cast upon the corporation and its trustees, to take all reasonable means for its protection.’ (*People v. Commercial Alliance Life Ins. Co.*, 148 N. Y. 563 (42 N. E. 1044).)” (41 Cal. App. 2d 190.)

The principle under discussion goes hand in hand with the kindred proposition that it is a fundamental right going to the heart of due process that a party to an action is entitled to independent counsel of his own choosing.

As said in the quiet title suit of *Roberts v. Anderson* (10 Cir.), 66 F. 2d 874:

“The right to a hearing includes the right to the assistance of counsel of his own choice, if requested. *Cooke v. United States*, 267 U. S. 517, 537, 45 S. Ct. 390, 69 L. Ed. 767; *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 64, 77 L. Ed. 158, 84 A. L. R. 527. In the case last cited, the Supreme Court said:

“‘If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.’

“With these fundamental principles, which are embedded in this and every other government of free institutions, in mind, let us examine the proceedings before the county court which culminated in the determination here relied upon by appellant.” (66 F. 2d at p. 876.)

The above principles established, it now remains to apply them to the factual pattern of these cases.

It is not in dispute, in fact the answer of the San Francisco Bank affirmatively alleged it [12511 R. 9/4060] that on March 29, 1946, the Los Angeles Bank was the owner or, in the alternative, the lawful holder and entitled to the possession of over \$45,000,000 of value in assets and properties. On that date the Commissioner and his subordinates, as the District Court here found [R. 1/293-4] without notice, hearing or trial,

- (1) Seized the business, property and assets of the Los Angeles Bank and the property and assets of its member shareholders in its possession;

- (2) Purported to *liquidate, consolidate, merge and dissolve* the Los Angeles Bank;
- (3) By concerted action with the Portland-San Francisco Bank, transferred the business, properties and assets of the Los Angeles Bank to the Portland-San Francisco Bank *without consideration or corporate action or assumption of liabilities* on the part of the latter.

None of these findings are attacked by appellants. (Br., Specification of Errors, pp. 17-18.)

Under these facts, it is perfectly obvious that had the Commissioner (a) retained the seized assets and properties in his own possession, or (b) placed them in the possession of a receiver, a conservator or some other type of custodian, the principles above discussed with reference to the utilization of a seized corporation's funds in resisting the seizure would have full application. Does it have any the less application because *eo instanti*, the Commissioner transferred the physical possession of the seized assets to the (now) San Francisco Bank?

The answer is necessarily and obviously no. The District Court found, as we have seen, *and the finding is not under attack*, that in receiving the assets the San Francisco Bank was acting in concert with the Commissioner, that it rendered no consideration therefor and took no corporate action with reference to the acquisition of the assets other than the mere receiving of their possession. The District Court could hardly have declared in clearer terms that the San Francisco Bank was the creature and accomplice of and a co-conspirator with, the Commissioner as well as being an involuntary transferee, without consideration, of the assets of the Los Angeles Bank.

From this situation two results inexorably follow. First, far from being in possession of assets and properties which it has bought and paid for, as the San Francisco Bank's protestation of present ownership would seem to imply, it holds their mere possession subject to all the rights and equities of the despoiled Los Angeles Bank; which means that it is a constructive trustee. Second, and more importantly from the standpoint of the legal principles under discussion, being the mere creature of the Commissioner so far as the transfer of possession is concerned, the San Francisco Bank is in precisely the same position as if the Commissioner had committed the possession of the assets to a receiver or other custodian, or had kept them or instituted liquidation proceedings himself. (In this connection, it will be recalled that purported "liquidation" was one of the multiple aims of the three administrative orders.)

Under the findings of the District Court, the San Francisco Bank thus holds, not in its own right, but as the creature and accomplice and under the *aegis* of the then Commissioner and present Board. Such being the case, the principles for which appellees contend as regards the allowance of fees here made, have full application.

Indeed, the arguments of appellants to the contrary prove too much. They are completely answered by what was said in *Anderson v. Great Republic Life Ins. Co.*:

"One of the arguments advanced by appellants should not go unnoticed, because of the implication therein. Appellants argue that since respondent was employed after the insurance company had been restrained from transacting any business or disposing of any of the assets and since the commissioner was appointed conservator of the insurance company shortly after respondent was so employed, the insur-

ance company lacked the capacity to contract and it likewise lacked the capacity to impose a lien or charge upon the assets in the custody of the conservator by authorizing an attorney to render services to it. If such an argument were valid, the result would be obvious. An insurance company proceeded against by the commissioner would be hamstrung in any effort to defend itself, the hands of its directors would be tied and there would be no effective recourse from unwarranted official action. If this were the case the effect would be to deny the company the right to counsel and hence to due process of law. Since in such a proceeding as this all the funds of the corporation are placed in the hands of the conservator, an arbitrary denial to the corporation of the use of any portion of such funds to pay attorneys' fees amounts to the same thing as a denial of the right to contract for the services of an attorney, the effect of which would be a denial of the right to defend at all." (41 Cal. App. 2d at p. 193.)

The answer to appellants' main contention along this line therefore is that the present cases are cases in which an allowance, in the discretion of the Court, as "between solicitor and client," is proper, following the pattern of *Barnes v. Newcomb* and the other authorities we have cited above, and this is particularly true because the administrative orders in question contained flavors of both purported *liquidation* and *dissolution*, as well as transfer and merger as regards the Los Angeles Bank. (Cf. *Watson v. Johnson*, *supra*, 24 P. 2d 592, where an allowance of attorneys' fees in resisting state receivership and dissolution proceedings was made and upheld after the corporation had actually been dissolved.)

VII.

Under Such Circumstances, an Interim Allowance of Attorneys' Fees Is Proper. The Test Is Not That of Ultimate Success or Failure in the Litigation; It Is Whether or Not the Defense or the Cause of Action, as the Case May Be, Is, as the District Court Here Found, Conducted in Good Faith and on Reasonable Grounds.

In awards of the type here under discussion, ultimate success or failure in the litigation is wholly a false quantity, the test being, as we have seen, whether the litigation was conducted in good faith and on reasonable grounds.

In *all* of the cases we have heretofore cited under Point VI hereof in conjunction with *Barnes v. Newcomb*, and as well in that case itself, the attempt of the corporation, either as plaintiff or as defendant, to regain or to retain its assets was unsuccessful. Yet, as we have seen, each of those cases proclaimed the propriety of an allowance of attorneys' fees out of the corporate assets, in the discretion of the Court, upon its being satisfied, as the District Court was here satisfied, that the cause of action or defense was maintained in good faith and on reasonable grounds.

The result is, that ultimate success or failure in the litigation, insofar as concerns an award of the type here involved, is wholly irrelevant. This factor, therefore, affords no basis for argument against the propriety of an interim allowance.

The propriety of an interim allowance in a case such as this was declared in *Pacific States Savings & Loan Co. v. Hise*, 25 Cal. 2d 822, although no award was actually

made because the element of reasonable grounds was held to be lacking. Proceeding under the California Building and Loan Association Act, California Stats. 1931, page 483, as amended: Deering Act 986, the California Building and Loan Commissioner had seized the assets of Pacific States. The latter commenced an action to regain its assets and to test the validity of the seizure, which action was ultimately decided against it. On an *interim* application for fees the Court actually commented upon the fact that the application had not been made *sooner*, saying:

“As pointed out earlier, the trial consumed approximately two years. Neither at its inception nor at any time during this period did Pacific States ask for an allowance of attorneys’ fees, although it was at all times represented by competent counsel, nor does it now ask for attorneys’ fees for these past services. Its application for an allowance of attorneys’ fees was made after the commissioner had rested his case and was for future legal services to compensate counsel during the production of evidence by Pacific States. . . .” (25 Cal. 2d at p. 840.)

In upholding the denial of attorneys’ fees, the Court in the *Hise* case stated:

“. . . A seized association, as in the case of receiverships, is not entitled as of right to attorneys’ fees and costs in resisting the seizure. An application therefor is addressed to the discretion of the trial court and should be granted only upon a showing that the resistance to the seizure is based upon reasonable grounds. . . .” (25 Cal. 2d at p. 841.)

The *Hise* case, therefore, stands as authority for the proposition that where, as here, good faith and reasonable grounds are found to be present, an *interim* allowance is properly within the discretion of the Court.

Another case involving Pacific States, *Eggert v. Pacific States Savings & Loan Co.*, 53 Cal. App. 2d 554, is squarely in point on the propriety of an *interim* allowance in a case where the right to possession of corporate assets is being defended, albeit the effort was ultimately held on appeal, affirming the judgment of the trial court, to have been unsuccessful.

In the *Eggert* action, certificate holders of Fidelity Savings & Loan Company, a building and loan association whose assets and properties had previously been taken over for purposes of liquidation by the State Building and Loan Commissioner, brought an action against Pacific States for the purpose of obtaining an adjudication that a previous transfer to Pacific States of the assets of Fidelity was, not an absolute transfer and sale of the assets, as claimed by Pacific States, but a transfer in trust for purposes of liquidation. Pending the litigation, Pacific States and its assets, including the disputed Fidelity assets in its possession, were also seized by the Building and Loan Commissioner, who thus became involved on both sides of the litigation and thereafter appeared as a neutral intervenor. Pacific States defended the action both in its own right and in the right of the disqualified Commissioner. After a long trial, judgment was entered decreeing, contrary to the contentions of Pacific States, that the transfer to it of the Fidelity assets had been a transfer in trust. Interim applications for attorneys' fees were then made to the trial court by

both plaintiffs and Pacific States. Fees were awarded to the plaintiffs on the trust fund recovery theory out of the recovered Fidelity assets.* As to the Pacific States application, the trial court found that its defense *vice* the disqualified and neutral Commissioner had been conducted in good faith and on reasonable grounds and ordered the Commissioner to pay the fees of Pacific States counsel out of the Pacific States assets in his possession. On appeal, this order was affirmed, the District Court of Appeal stating:

“Appellant urges for reversal of the order two propositions, which will be stated and answered hereunder *seriatim*.

“First: The Superior Court of Los Angeles County is without jurisdiction to direct appellant to pay attorney’s fees of respondent’s counsel from the assets of Pacific States.

“This proposition is untenable. Appellant after taking possession of the assets of Fidelity and Pacific States, occupied the status of trustee of the assets of each of said corporations (*Evans v. Superior Court*, 14 Cal. (2d) 563, 573 [96 P. (2d) 107]), and it was his duty as such trustee to take all reasonable means for the protection of these assets for the benefit of the respective corporations, their stockholders, investment certificate holders, and creditors. Hence, when plaintiffs sought to have a trust im-

*This order was not appealed from.

posed upon certain assets of the Pacific States, it was appellant's duty to defend against this attempt to impress a lien upon the assets of the trust which he was administering. Hence, he properly voluntarily intervened in the present action and thereby the court acquired jurisdiction *in personam* over appellant, which conferred upon the court, plenary powers with reference to all matters directly or incidentally arising with respect to the present litigation. (*Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 197, *et seq.* [152 Pac. 542].)

“*Second: The trial court has no authority in an action of this nature to fix or allow respondent's attorney's fees.*

“This proposition is also untenable. It is the general rule that, where for any reason a trustee fails to protect trust assets from adverse claims, a beneficiary may do so and may be awarded counsel fees out of the trust assets, if the defense is conducted in good faith and on reasonable grounds. (*Trustees v. Greenough*, 105 U. S. 527, 532 [26 L. Ed. 1157]; see, also, *Beach on Trusts and Trustees* (1897), vol. 2, 1599, §698.) See, also, for the application of the same principle to an analogous situation. (*Anderson v. Great Republic Life Insurance Co.*, 41 Cal. App. (2d) 181, 190 [106 P. (2d) 75].) A different rule does not apply, even though the beneficiary is unsuccessful in the litigation. (*Dingwall v. Seymour*, 91 Cal. App. 483, 513 [267 Pac. 327].)” (53 Cal. App. 2d at pp. 557, 558.)

Several features of interest will be noted about the *Eggert* case. In the first place, Pacific States was resisting an attack upon its own assets in the hands of the Building and Loan Commissioner, a situation wholly analogous to that presented here, where the Los Angeles Bank is resisting an attack upon its own assets in the hands of an involuntary transferee and nominee of the Federal Home Loan Bank Commissioner. In the second place, there, as here, the defense of the assets was found to have been maintained in good faith and reasonable grounds. In the third place, the Court there had jurisdiction *in personam* over the Building and Loan Commissioner, as here it has jurisdiction *in personam* over the San Francisco Bank, the entity in actual possession of the Los Angeles Bank assets. In the fourth place, the award there, as here, was an *interim* award, for the *Eggert* judgment on the merits was appealed and finally affirmed by opinion of the District Court of Appeal rendered on February 23, 1943, reported at 57 Cal. App. 2d 239, whereas the judgment of that court affirming the order awarding attorneys' fees to Pacific States had been rendered on July 24, 1942. (52 Cal. App. 2d at p. 554.)

It is therefore submitted that the *interim* awards made below were perfectly proper; and we now turn to appellants' contentions regarding the fact that the District Court ordered the fees to be paid out of moneys in the registry of the Court.

VIII.

The District Court Did Not Err in Directing Payment of the Attorneys' Fees Out of Moneys in the Registry of the Court; and Appellants' Arguments to the Contrary Are Moot and Academic.

The contentions of appellants in this regard necessarily assume, in the abstract, the propriety of an order awarding fees to the appellees. Their only quarrel under this head relates to the source of the payments.

The order in substance provided that the fees should be paid out of moneys on deposit in the registry of the Court with no allocation or apportionment other than a provision that the funds and assets of the Long Beach Association should never bear any part of such allowance. [R. 1/310-311.]

Appellants, with all respect, waste considerable space in pointing out that certain other parties have funds on deposit in the registry of the Court which, they say, should not be devoted to the payment of the fee award. Again with all respect, we are impelled to remark that this is no concern of appellants. The other parties are not appealing from the order, and certainly appellants cannot be aggrieved if the burden of the fee award should fortuitously happen to fall on someone else.

Exception is also taken to the fact that the order exempts the Long Beach Association from the burden of the award. There is no reason why Long Beach should not be so exempted. Long Beach, like the Wilmington Association represented by Mr. Gilbert, is represented by its own counsel. And certainly, insofar as the award to the Los Angeles Bank is concerned, there is no reason whatever why Long Beach should stand any part of an award out of the assets and properties of the Los Angeles Bank in the hands of the San Francisco Bank.

Viewed thus in its proper perspective, and postulating, as appellants' contentions under this head do postulate, the propriety of an award out of the Los Angeles Bank assets in the hands of the Commissioner's involuntary transferee, appellants have no standing whatever to complain of an order awarding the fees out of moneys in the registry of the Court.

Nor is it necessary to analyze the components of the fund on deposit in the registry to arrive at this conclusion. The San Francisco Bank either has moneys in the registry or it has not. If it has not, appellants certainly have no ground for complaint. On the other hand, if it does have money in the registry (and, of course, it does), it is certainly no worse off if the fees are paid out of its moneys actually on deposit with the Court than it would be under a court order requiring it to pay over the amount of the fees out of Los Angeles derived funds held by it generally. The matter is merely one of bookkeeping, for nowhere does the San Francisco Bank deny that the Los Angeles derived funds in its possession are more than ample to cover the fees actually awarded.

It must be remembered—and appellants have a studied tendency to forget it—that the San Francisco Bank is here in precisely the same position as was the Building and Loan Commissioner in the Eggert fee appeal (53 Cal. App. 2d 554) wherein, it will be recalled, an order was affirmed which directed the Commissioner to pay over the amount awarded, since there, as here, the Court had “acquired jurisdiction *in personam* over appellant, which conferred upon the Court plenary powers with reference to all matters directly or indirectly arising with respect to the litigation. (*Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 197, *et seq.*

[152 Pac. 542].)" Whatever appellants' contentions with reference to the jurisdiction over other parties may be, it is not open for them to deny that the San Francisco Bank was sued, served and appeared below strictly *in personam*. Such being the case, the Court had jurisdiction to order payment either out of Los Angeles derived funds in its hands generally, or out of their equivalent heretofore deposited by the San Francisco Bank in the registry; and the San Francisco Bank is in no better position to complain in the one case than in the other.

It must be concluded, we submit, that appellants' arguments under this head are both moot and academic.

Conclusion.

It will have been noted that so far as this brief of these appellees is concerned, the award of fees to them has been treated entirely from the standpoint of an award to them as counsel for the Los Angeles Bank, as distinguished from the member associations which these appellees represent. This is pursuant to the position taken by them in the Court below that since everything done for the Bank had been done as well for and inured directly to the benefit of its member associations not otherwise independently represented in the action (namely, Long Beach and Wilmington), an award for services to the Bank would likewise cover the services rendered to such member associations, thus avoiding a doubling up of fees to these appellees. [R. 2/742-744.] Mr. Gilbert, representing the Wilmington Association, will, of course, present the matter from the association standpoint, which is, as it was in the lower court [R. 2/744], an additional reason for our not going into that field.

The same is true insofar as expanding the argument on the basic jurisdiction below is concerned. As in the earlier appeal in No. 12511, we have confined our argument to the jurisdiction of the District Court over the Los Angeles (as distinguished from the Mallonee) phase of the litigation.

Also, we have endeavored to confine our remarks to the basic questions presented on this appeal, to the exclusion of side issues. We see no point in dignifying such bizarre contentions as that the member associations of the Los Angeles Bank were not aggrieved by the seizure because their stock in that bank (*and for which they had paid \$100 per share*) had, it is said, no market value. It will of course be recalled in this connection that millions of dollars of the assets of the member associations were, by *fiat* of the Commissioner and without their knowledge or consent, transferred to the San Francisco Bank; in other words, a plain case of conversion.

It is respectfully urged that the order appealed from should be affirmed and that the undertakings heretofore filed by appellees for return of these heretofore paid fees in the event of reversal should be ordered delivered up to appellees for cancellation.

Respectfully submitted,

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No. 12591.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FAHEY, *et al.*,

and

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,
Appellants,

vs.

O'MELVENY & MYERS and RICHARD FITZPATRICK

and

W. I. GILBERT, JR.,

and

MALLONEE, *et al.*, THE SHAREHOLDERS, PROTECTIVE COMMITTEE,

and

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,
et al.,
Appellees.

On Appeal From the United States District Court for the
Southern District of California Central Division

Brief for Appellees Mallonee, *et al.*, the Shareholders'
Protective Committee and Long Beach Federal
Savings and Loan Association as Respondents in
Appeal From "Order Re: Allowance of Attorneys'
Fees on Account" to O'Melveny & Myers and
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TOPICAL INDEX.

	PAGE
Index to pleadings of appellees (partial).....	vii
Description of the litigation.....	2
Jurisdictional statement	5
In rem	6
In interpleader	6
Under the Administrative Procedure Act.....	6
Diversity of citizenship	6
Federal questions	7
Statement of the case.....	9
Introduction	9
From admitted or final findings of fact.....	12
1. Seizure of the Los Angeles Bank ("sue and be sued corporation")	12
2. Seizure of the solvent Long Beach Association.....	14
3. Class actions commenced May 27, 1946.....	14
4. Actions consolidated November 7, 1947.....	15
5. Good faith and reasonable grounds.....	15
6. Congressional Committee recommendations, 1946.....	15
7. Interpleader—\$14,000,000.00 in court.....	16
8. Clouded titles—cleared	17
9. Intimidation	20
10. Denial of counsel is denial of due process.....	21
11. Attorneys' fees to be judicially determined as U. S. Attorney agreed	22
12. Funds of associations on deposit exceed attorneys' fees	25

ii.

PAGE

13. \$100,000.00 Los Angeles Bank assets used by San Francisco Bank to pay its attorneys (stockholders vote against San Francisco Bank use of funds to litigate)..	25
14. No objection by any stockholder to payment of Los Angeles Bank's attorneys' fees	26
Summary of facts.....	26
Questions presented	27
Summary of argument.....	29
Argument	33

I.

Denial of counsel is denial of due process.....	33
---	----

II.

Jurisdiction of the court to allow attorneys' fees, and over the parties and subject matter generally, is res judicata, as established by final judgments in 1947, 1948 and 1949.....	36
The court's jurisdiction in interpleader became final and conclusive upon expiration of time to appeal from the interpleader orders and judgments.....	43

III.

The court below has jurisdiction in interpleader, and otherwise, over the approximately \$14,000,000.00 of assets in the registry of the court and can allow attorneys' fees therefrom	45
--	----

IV.

The consolidation actions present appropriate claims for equitable relief, which have already resulted in final judgments disposing of a portion of the issues.....	58
---	----

V.

The court's power to make interim allowances of attorneys' fees is not postponed until a successful termination of the litigation	69
---	----

VI.

Litigation of this magnitude, involving the constitutional guarantees of thousands of depositors in hundreds of savings institutions, should not be decided upon a collateral issue prior to full hearing on the merits.....	74
A trial is necessary.....	77
Conclusion	77

Appendix :

Exhibit A. Order denying stay, dated June 19, 1950....App. p.	1
Exhibit B. Letter from Peyton Ford, the assistant to the Attorney General, to Westover & Smith, attorneys at law, dated April 27, 1949.....App. p.	4

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231	41, 57
Ammann, et al. v. Mallonee, et al., No. 11751.....	3
Baldwin v. Iowa Traveling Men's, etc., 283 U. S. 522, 75 L. Ed. 1244	40, 57
Chicot, etc. v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329..	41
Crump v. Ramish, 86 F. 2d 362.....	51
Deckert v. Independence Shares Corp., 311 U. S. 282, 85 L. Ed. 189	74
Dee v. United Exchange Building, 88 F. 2d 372.....	52
Dugas v. American Surety, 300 U. S. 414, 81 L. Ed. 720.....	43
Eggert v. Pacific States Savings & Loan Co., 53 Cal. App. 2d 554	69
Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91 L. Ed. 2030	3, 72, 77
Fahey, et al. v. Mallonee, et al., No. 11867.....	3
Fahey, et al. v. Mallonee, et al., No. 12511.....	4
Fahey, et al. v. O'Melveny & Myers, et al., No. 12591.....	4
Fahey et al. v. Ronald Walker, Special Master of the United States District Court, No. 12575.....	4
Fahey et al. v. Ronald Walker, Special Master of the United States District Court, No. 12893.....	4
Fahey, et al. v. Ronald Walker, Special Master of the United States District Court, No. 13055.....	5
Fahey, Ex parte, 332 U. S. 258, 91 L. Ed. 2041.....	3, 10, 36, 72
Federal Housing Administration v. Burr, 309 U. S. 242, 84 L. Ed. 724	64
Glidden v. Cowen, 123 Fed. 48.....	52
Goldstein v. Polakoff, et al., 135 F. 2d 45.....	11
Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231....	67
Joint Anti-Fascist v. McGrath, 341 U. S. 123, 95 L. Ed. 817....	60

	PAGE
Keifer v. R.F.C., 306 U. S. 381, 83 L. Ed. 784.....	64
Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209.....	56, 63
Mallonee v. Fahey, No. 5421-PH, Sept. 30, 1947.....	22
Marx v. Hanthorn, 148 U. S. 172, 37 L. Ed. 410.....	59
Monaghan v. Hill, 140 F. 2d 31.....	48
Montgomery Ward & Co. v. Langer, 168 F. 2d 182.....	76
Munoz v. Porto Rico Ry. Light & Power Co., 83 F. 2d 262; cert. den., 298 U. S. 689, 80 L. Ed. 1408.....	75
National Labor Relations Board v. Pittsburgh Steamship Co., 340 U. S. 498, 95 L. Ed. 479.....	65
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158.....	34
Prudential Ins. Co. v. Small Claims Court, 173 P. 2d 38, 76 Cal App. 2d 379.....	33
Publicity, Etc. v. Collector of Internal Revenue, 139 F. 2d 583..	75
Reconstruction Finance Corporation v. Menihan, 312 U. S. 81, 85 L. Ed. 595.....	64, 65
Roberts v. Anderson, 66 F. 2d 874.....	34
Sprague v. Ticonic Bank, 307 U. S. 161, 83 L. Ed. 1184.....	45, 48, 64, 65
Steen v. Board of Civil Service Com'rs, 160 P. 2d 816, 26 Cal. 2d 716	34
Stoll v. Gottlieb, 305 U. S. 165, 83 L. Ed. 104.....	39
Tracy v. Spitzer, etc., 12 F. 2d 755.....	52
Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85	40, 44
United States v. Munsingwear, 340 U. S. 36, 95 L. Ed. 36....	38
United States v. Yellow Cab Company, 338 U. S. 338, 94 L. Ed. 150	11
Universal Camera Corp. v. N.L.R.B., 340 U. S. 494, 95 L. Ed. 456	65

	PAGE
Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95.....	66
Wingate v. Bercut, 146 F. 2d 725.....	11
Winslow v. Ferguson, 153 P. 2d 714, 25 Cal. 2d 274.....	70
Wittmayer v. United States, 118 F. 2d 808.....	11

HOLY BIBLE

1 Timothy V-18 or Luke X-7.....	1, 78
---------------------------------	-------

STATUTES

Executive Order No. 9070.....	8
Federal Home Loan Bank Act, 47 Stat. 725 (12 U. S. C. 1421)	7
Federal Rules of Civil Procedure, Rule 52(a).....	11
Federal Rules of Criminal Procedure, Rule 22.....	6
First War Powers Act of 1941, 55 Stat. 838 (50 U. S. C. App. 601)	8
Home Owners' Loan Act of 1933, 48 Stat. 128 (12 U. S. C. 1461)	7
National Housing Act, 48 Stat. 1246 (12 U. S. C. 1724).....	7
Public Law 404, 79th Cong., Chap. 324, 2d Sess.....	6
Reorganization Act of 1945, 59 Stat. 613 (5 U. S. C. 133y).....	8
United States Code, Title 5, Sec. 1009.....	6
United States Code, Title 28, Sec. 41(26) (now Secs. 1335, 1397, 2361)	6
United States Code, Title 28, Sec. 118 (now Sec. 1655).....	6
United States Code, Title 28, Sec. 1291.....	8
United States Code Annotated, Title 5, Secs. 1001-1011.....	6
United States Code Annotated, Title 5, Sec. 1009(e).....	63
United States Code Annotated, Title 5, Sec. 10(e).....	63

INDEX TO PLEADINGS OF APPELLEES.
(Partial)

FILED PAGE

- I. PLAINTIFF in class action 5421-P.H.
Shareholders' Protective Committee of
Long Beach Association, *i. e.*, Mal-
lonee, *et al.*
- A. Complaint (commencing class ac-
tion 5421-P.H.) 5-27-46 R. 2
vs. John H. Fahey as Chairman of
Federal Home Loan Bank Board,
A. V. Ammann, as Conservator,
and both also individually; Long
Beach Association, *et al.*
- B. First Amended & Supplemental
Complaint 12-9-47 R. 2961
vs. Fahey, Ammann, Federal Home
Loan Bank of San Francisco and/
or Portland, and their named di-
rectors and officers (present and
former), officially and individually.
- C. Supplement to the First Amended
and Supplemental Complaint 5-23-49 R. 6798
vs. The Home Indemnity Com-
pany, and the Federal Savings
and Loan Insurance Corporation,
joined as defendants.

	FILED	PAGE
II. THIRD-PARTY PLAINTIFFS AND CROSS-CLAIMANT in class action 5421-P.H.— Long Beach Association.		
A. Third-Party Complaint	7-1-46	R. 285
vs. Banks of San Francisco, Portland and/or Los Angeles, as third-party defendants,		
Cross-Claim	7-1-46	R. 323
vs. John H. Fahey, A. V. Ammann, Banks of San Francisco, Portland and/or Los Angeles, <i>et al.</i>		
B. Amended Cross-Claim	1-12-48	R. 3188
vs. Fahey, as Chairman of the Home Loan Bank Board, etc., Ammann, as Conservator and both also individually, Banks of San Francisco and/or Portland and their named directors and officers (present and former) officially and individually.		
C. Supplemental Cross-Claim to Amended Cross-Claim of Long Beach Association	5-28-48	R. 4161
vs. Fahey, as Chairman of the Home Loan Bank Board, etc., Ammann as Conservator, and both also individually, Bank of San Francisco and/or Portland and their named directors and officers (present and former) officially and individually, and the Bank of Los Angeles.		

	FILED	PAGE
D. Motion for Order Requiring Los Angeles Bank and San Francisco Bank to Deposit in Court the Amount of Their Disputed Claims	2-9-48	R. 3562
E. Second Supplemental Cross-claim of Long Beach Association vs. Fahey and Amman, individually as well as in official capacities, George K. Bramley, Home Loan Bank Board, William K. Divers, Chairman, J. Alston Adams, member, O. K. LaRoque, member, Banks of San Francisco and/or Portland and their named directors and officers (present and former), officially and individually, The Federal Savings and Loan Insurance Corporation, The Home Indemnity Company, Harold Lee Newendrop, Charles E. Bradley, George Turner, <i>et al.</i>	5-23-49	R. 6736
F. Fourth Supplemental Cross-claim To Clear and Quiet Title of Approximately 48 Homeowners	6-14-51	*
G. There have been six interpleaders by the Long Beach Association of insurance premiums charged by Federal Savings and Loan Insurance Corporation, amounting to \$89,026.33, as follows:		
1. First Interpleader	4-16-49	R. 6473
2. First Supplemental Interpleader	6-7-49	R. 6920

	FILED	PAGE
3. Second Supplemental Inter-pleader	2-13-50	R. 8965
4. Third Supplemental Inter-pleader	11-14-50	*
5. Fourth Supplemental Inter-pleader	4-28-51	*
6. Fifth Supplemental Inter-pleader	10-8-51	*

*Not printed in six pending appeals.

III. PLAINTIFFS in consolidated action 5678-W.M., Bank of Los Angeles, Coast Association, Wilmington Association, *et al.*, and Bank of Los Angeles. Los Angeles Bank is also a third-party defendant in class action 5421-P.H.

- A. Cross-Claim of Bank of Los Angeles in action 5421-P.H. 8-22-46 R. 564
- vs. Bank of Portland, a.k.a. Bank of San Francisco, John H. Fahey, individually and as Chairman of the Federal Home Loan Bank Board, *et al.*
- B. Complaint in consolidated action 5678-W.M. 8-27-46 R. 9465
- vs. Bank of Portland, a.k.a. Bank of San Francisco, John H. Fahey, individually and as Chairman of the Federal Home Loan Bank Board, etc.

	FILED	PAGE
C. Motion for Order Directing Payment of Attorneys' Fees on account (for Los Angeles Bank attorneys)	1-6-49	R. 5698
IV. PLAINTIFF in consolidated action 5678-W.M., Wilmington Association, one of the six individual associations—plaintiff in said class action.		
A. Complaint (same as Plaintiffs III <i>supra</i>)	8-27-46	R. 9465
vs. Bank of Portland, a.k.a. Bank of San Francisco, John H. Fahey, individually and as Chairman of the Federal Home Loan Bank Board, etc.		
B. Motion and Petition for Allowance on Account of Attorneys' Fees and Costs in Class Action, (For Wilmington Association Attorneys)	2-10-50	R. 8909
V. CROSS-CLAIMANT IN INTERPLEADER in action 5421-P.H. Title Service Company as Trustee.		
A. Cross-claim in Interpleader	6-4-46	R. 43
vs. John H. Fahey, A. V. Ammann, officially and individually, Long Beach Association, <i>et al.</i> Interplead \$12,000,000 of notes, trust deeds, titles to homes of 8,000 borrowers, etc., asks determination of ownership and court's instructions as to reconveyances.		

	FILED	PAGE
B. Supplemental Cross-claim in Interpleader vs. Defendant John H. Fahey, and all other remaining named defendants (additional notes and trust deeds interplead).	8-8-46	R. 766
C. Second-Supplemental Cross-claim vs. Defendant, John H. Fahey and all other remaining named defendants (Additional securities interplead)	1-22-47	R. 995
D. Third-Supplemental Cross-Claim in Interpleader vs. John H. Fahey, and all other remaining named defendants (Additional securities interplead).	8-29-47	R. 2305
E. Fourth-Supplemental Cross-Claim in Interpleader vs. John H. Fahey and all other remaining named defendants (Additional securities interplead).	10-28-47	R. 2581
VI. CROSS-CLAIMANT IN INTERPLEADER, in Action 5421-P.H. George Turner.		
A. Cross-claim in Interpleader and in the Nature of Interpleader vs. Harold Lee Newendorp, Charles E. Bradley, A. V. Ammann, John H. Fahey, individually and in their representative capacities, if any, Home Loan Bank Board and the members thereof, Long Beach Association, Shareholders Protec-	1-29-48	R. 3461

tive Committee and all others named. (Interplead rents and asks determination of validity of lease of real property.)

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|----|--|---------|---------|
| B. | Supplement to Cross-claim in Interpleader
vs. Same Cross-defendants in Interpleader (Additional rents interplead.) | 3-29-48 | R. 3872 |
| C. | First Amendment to Cross-claim in Interpleader
vs. Harold Lee Newendorp, <i>et al.</i> | 3-1-48 | R. 3640 |
| D. | Second Supplement to Cross-Claim in Interpleader
vs. Same Cross-Defendants in Interpleader (Additional rents interplead). | 11-7-49 | R. 8138 |

VII. CROSS-COMPLAINT IN INTERPLEADER, in action 5421-P.H., Robert H. Wallis.

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|----|--|---------|-------|
| A. | Cross-Claim in Interpleader
vs. John H. Fahey, A. V. Ammann and all other named defendants. Interplead \$50,000 Cashier's Check, asked Court's instructions as to payment of Attorneys' fees therefrom. | 6-12-46 | R. 86 |
|----|--|---------|-------|

No. 12591.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FAHEY, *et al.*,

and

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,
Appellants,

vs.

O'MELVENY & MYERS and RICHARD FITZPATRICK

and

W. I. GILBERT, JR.,

and

MALLONEE, *et al.*, THE SHAREHOLDERS, PROTECTIVE COMMITTEE,

and

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,
et al.,

Appellees.

Brief for Appellees Mallonee, et al., the Shareholders' Protective Committee and Long Beach Federal Savings and Loan Association as Respondents in Appeal From "Order Re: Allowance of Attorneys' Fees on Account" to O'Melveny & Myers and Richard Fitzpatrick, and W. I. Gilbert, Jr.

APPEAL.

"THE LABOURER IS WORTHY OF HIS REWARD."

(1 Timothy V-18 or Luke X-7)

This "Appeal No. 12591" is from "Findings of Fact, Conclusions of Law, and Order *re* Allowance of Attor-

from clouds created by seizures and wholesale assignments and transfers of seized assets by appellants.

10. *Fahey, et al. v. Mallonee, et al.*, No. 12511, one of six appeals presently pending before this Court of Appeals, the record on which single appeal comprises 24 volumes of over 11,000 printed pages.

11. *Petition by Fahey, et al., for writ of prohibition, mandamus or other appropriate writ, v. United States District Judge Peirson M. Hall.* Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

12. *Petition by Federal Home Loan Bank of San Francisco, et al., for writ of prohibition, mandamus or other appropriate writ v. United States District Judge Peirson M. Hall.* Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

13. *Fahey, et al. v. Ronald Walker, Special Master, of the United States District Court*, No. 12575, presently pending appeal from order allowing fees to Special Master, taken May 3-5, 1950. Appellees' motions to dismiss this appeal were argued on October 19, 1951.

14. *Fahey, et al. v. O'Melveny & Myers, et al.*, No. 12591, presently pending appeal from order allowing attorneys' fees, taken June 20, 1950.

15. *Fahey, et al. v. Ronald Walker, Special Master of the United States District Court*, No. 12575, presently pending appeal from orders allowing fees to Special Master, taken about November 28, 1950, and December 8, 1950.

16. *Fahey, et al. v. Ronald Walker, Special Master of the United States District Court*, No. 12893, presently pending appeal from order allowing fees to Special Master, taken February, 1951.

17. *Fahey, et al. v. Ronald Walker, Special Master of the United States District Court*, No. 13055, presently pending appeal from order allowing fees to Special Master, taken about May 23, 1951.

CONGRESSIONAL INVESTIGATIONS.

1. Tenth Intermediate Report of the Select Committee to Investigate Executive Agencies, Seventy-Ninth Congress, Second Session, Investigation of Federal Home Loan Bank Administration, dated July 25, 1946.

2. 1950-51 Investigation by Representative Holifield's Special House Subcommittee of the Committee on Expenditures in the Executive Departments, investigating the Home Loan Bank Board. This investigation is presently in recess.

JURISDICTIONAL STATEMENT.

The U. S. District Court had, and has, jurisdiction of these *in rem* and *quasi in rem* actions to determine ownership of approximately \$145,000,000.00 of real and personal property, all physically located within the district of California.

These actions seek to recover physical possession of, remove clouds, liens, and encumbrances upon, and to quiet title to, said properties fraudulently and unlawfully seized, without notice or hearing.

It is alleged in the jurisdictional paragraphs of the various complaints, cross-claims, third-party complaints, and similar documents² that the District Court has jurisdiction of the res and of these actions:

²References to the various pleadings are in Appeal No. 12511, R. 2, 287, 323, 566, 2962, 3190, 6738, 6802, 6852, 9466, and others.

(1) IN REM.

By quiet title statute, 28 U. S. C. 118—now Section 1655;

(2) IN INTERPLEADER.

(a) By statute, 28 U. S. C. 41(26)—now Sections 1335, 1397, and 2361;

(b) By Rule 22, F. R. C. P.;

(c) By inherent equity interpleader jurisdiction.

(3) UNDER THE ADMINISTRATIVE PROCEDURE ACT.

5 U. S. C. A. 1001-1011, Public Law 404, 79th Congress, Chapter 324, 2nd Session, and particularly Section 1009 U. S. C. (Sec. 10 of said Act), which provides in part as follows:

“(a) Rights of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.” (Emphasis added.)

(4) DIVERSITY OF CITIZENSHIP.

There is diversity of citizenship.

California Associations, Banks, Stockholders and Shareholders v. Foreign Defendants: Ammann of Maryland, Fahey of Massachusetts, Divers of Ohio, LaRoque of North Carolina, Adams of New Jersey, the Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation, Claiming Residence in Washington, D. C., and doing business in California.

The non-resident defendants have all been served with process, either in California, or pursuant to court order for service on absent defendants, wherever the United States Marshal could find them.

Quieting title and interpleader jurisdiction, both to summon and to enjoin, run throughout the United States.

(5) FEDERAL QUESTIONS.

Federal questions involved are the constitutionality, interpretation, application, and effect of:

(1) The Federal Home Loan Bank Act, 47 Stat. 725, 12 U. S. C. 1421, under which defendants Federal Home Loan Banks of San Francisco, Portland and Los Angeles, were organized and exist, and the ownership of the over \$120,000,000.00 of their assets, involved in this litigation.

(2) The Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C. 1461, et seq., under which appellee Long Beach Federal Savings and Loan Association was organized and exists, and upon the application, interpretation and effect of which ownership, of its more than \$25,000,000.00 in assets involved in this litigation, is to be determined.

(3) The National Housing Act, 48 Stat. 1246, 12 U. S. C. 1724, et seq., under which defendant Federal Savings and Loan Insurance Corporation was organized and exists, and upon the application, interpretation, and effect of which its liabilities in said litigation, alleged to exceed \$20,000,000.00, are to be determined.

Some of the other Federal enactments, the validity and construction of which are placed in issue by the pleadings, are:

(a) The First War Powers Act of 1941 (55 Stat. 838, 50 U. S. C. App. 601) and Executive Order No. 9070 thereunder;

(b) Reorganization Act of 1945 (59 Stat. 613, 5 U. S. C. 133y, etc.); and

(c), Rules, Regulations, Directives and Orders, claimed to have been adopted pursuant to the authority of said Acts and many others.

The jurisdictional paragraphs of the various complaints, cross-claims, third-party complaints, and other pleadings, contain references to many additional Acts of Congress, sections of the United States Constitution, Regulations, purportedly adopted under one or more of said Acts of Congress, and other sources of federal questions.

Further complete treatment of the subject of jurisdiction will be found in the "Brief for Appellees-Plaintiffs (Shareholders Protective Committee)," pages 37 to 70, and in the "Brief for Appellee Long Beach Federal Savings and Loan Association," pages 77 to 122, in Appeal No. 12511.

The appellants claim that the Circuit Court of Appeals has jurisdiction under 28 U. S. C. 1291.

STATEMENT OF THE CASE.

INTRODUCTION.

This statement of the case is intended to cover only the subjects relating to attorneys' fees. A more comprehensive statement of the entire case is already before this Honorable Court:

(1) "Statement of the Case," pages 12 to 54 of the brief for Appellee Long Beach Federal Savings and Loan Association;

(2) "Description of the Litigation" and "Statement of Facts," pages 10 to 19 of the Brief for Appellee plaintiffs (Shareholders Protective Committee), both in Appeal No. 12511; and

(3) "The Facts" summarized, pages 19 to 44 in Plaintiffs Opposition to Stay of Payment of Attorneys' Fees, etc., in this Appeal No. 12591.

Appellants have insisted throughout the seventeen³ different appellate and other court proceedings that none of their seizures or confiscations were subject to court review under any circumstances.

Appellants have also insisted that appellees could not use any part of appellees' own property or assets for the payment of attorneys' fees for court action against appellants.

In none of the seventeen appellate and other court proceedings have either of these contentions of appellants been upheld.

³Of the 17 appeals, writs, etc., 15 have been taken or commenced by appellants. Only the two original class actions filed in 1946 were commenced by appellees.

In the United States Supreme Court in 1946-1947, and in this Honorable Court of Appeals in 1947-1948, appellants sought writs, stays, and other obstructions to the payment of attorneys' fees then allowed by the District Court to attorneys for plaintiffs in one of the class actions, (No. 5421-PH). The writs and stays were denied by both the United States Supreme Court⁴ and by this Honorable Court of Appeals,⁵ and thereafter the attorneys' fees allowed by the District Court were paid from the assets in the registry of the Court.

Appellants immediately abandoned, not only their attempts to block payment of attorneys' fees, but within six weeks thereafter, appellants confessed judgment in the District Court, removed the conservator previously appointed for the Long Beach Association, returned the Association and the remnants of its assets to the founding management, and ordered the removed conservator to account with the court below for his dealings with the seized \$26,000,000.00 in assets.

The Los Angeles Bank has not yet been restored, but if appellants follow in the *Los Angeles Bank* case, the pattern which they followed in the *Long Beach* case, decision of this attorneys' fee appeal may well decide the fate of the Los Angeles Bank.

In allowing attorneys' fees on account to attorneys for the plaintiffs in class Action No. 5678-PH, who are seeking return of the seized Los Angeles Bank, the District Court, after full hearings, made twenty-one (21) "Find-

⁴*Ex parte Fahcy*, 332 U. S. 258, 91 L. Ed. 2041.

⁵Appeal No. 11751, C. C. A. 9, Stay Denied, Appeal Dismissed February 6, 1948.

ings,”⁶ and eleven (11) conclusions of law, of which appellants specifically challenge on this appeal, only Findings Nos. 14, 15, 16, 17, 18 and 21, but they do not point out any insufficiency of the evidence to sustain the findings.⁷

Appellants also claim the Court is without jurisdiction and generally challenge all findings to the contrary.⁸

Appellants applied both to the District Court and to this Honorable Court of Appeals for a stay of payment of the attorneys’ fees attacked on this appeal. Both the District Court and this Court of Appeals denied such stay. The District Court in its order denying the stay likewise made findings of fact, which are printed in the appendix as Exhibit A, pages 1 to 3.

The Trial Court’s findings were made after more than 100 hearings in the more than five years of litigation before this same trial judge.

⁶“Findings of Fact, Conclusions of Law, and Order re Allowance of Attorneys’ Fees on Account,” here appealed from. [Apl. No. 12591, R. 288.]

⁷Appellants present no argument to support this claim of error. “Therefore we need not consider the point.” (*Wingate v. Bercut*, 146 F. 2d 725 (C. C. A. 9—1941); *Goldstein v. Polakoff, et al.*, 135 F. 2d 45 (C. C. A. 9—1943); *Wittmayer v. U. S.*, 118 F. 2d 808 (C. C. A. 9—1941).)

⁸“Findings of Fact shall not be set aside unless clearly erroneous . . .” Rule 52(a), F. R. C. P., which applies to appeals by the government as well as to those by other litigants. (*United States v. Yellow Cab Company*, 338 U. S. 338, 94 L. Ed. 150 (1949).)

STATEMENT OF THE CASE.

FROM ADMITTED OR FINAL FINDINGS OF FACT.

1. SEIZURE OF THE LOS ANGELES BANK:

“That on or about the 29th day of March, 1946, the Federal Home Loan Bank⁹ of Los Angeles had assets of approximately \$46,000,000.00, was entirely solvent, and had a surplus of approximately \$1,900,000.00. That the business, property and assets of said Los Angeles Bank as well as the property and assets of its shareholder and member Associations then in the possession of the Los Angeles Bank either as pledgee, depository, custodian, trustee or bailee, or otherwise, were, on or about March 29th, 1946, and without notice, hearing or trial, seized among others by defendants Fahey and Ammann and purportedly on said date of March 29th, 1946, the said Los Angeles Bank was by said defendants, liquidated, consolidated, merged and dissolved. That the defendant and cross-defendant Federal Home Loan Bank of San Francisco and/or Federal Home Loan Bank of Portland, on said date, and acting in concert with Fahey, Ammann and other defendants and cross-defendants, received and took possession and control of said assets herein referred to and which at the time of said seizure, were in possession of the Federal Home Loan Bank of Los Angeles. That after said seizure, the said San Francisco and/or Portland

⁹The Los Angeles Bank was founded in 1932 with an initial capital of \$10,000,000.00. In ~~12~~ years it had grown to \$46,000,000.00. [Apl. No. 12511, R. 4559, 6454.] It was completely solvent, prosperous, and growing. It had never been accused of any misconduct or wrongdoing whatsoever. It had been examined by appellants on March 15, 1946, just two weeks prior to its seizure. The examination report contained no criticism nor did it direct correction of any matters.

Bank has ever since been in possession of said assets and since said date the plaintiff Los Angeles Bank, as such, has had no property or assets in its actual possession or under its actual control with which to employ counsel. That on said date said assets were purportedly transferred by certain defendants to said Portland Bank without any consideration to the Los Angeles Bank or any of its member stockholders and without any resolution by the Portland Bank requesting permission to acquire any assets of the Los Angeles Bank and without any resolution or request of the Portland Bank to assume any of the liabilities of the Los Angeles Bank. That simultaneously with said seizure the name of said Portland Bank was purportedly changed to Federal Home Loan Bank of San Francisco by the Federal Home Loan Bank administration.”¹⁰ [Apl. No. 12591, R. 293-294.]

¹⁰“SUE AND BE SUED”—Federal Home Loan Bank Act, 12 U. S. C. A. 1421, at 1432, provides that the home loan banks (of San Francisco and/or Portland and/or Los Angeles, whichever exists) is a “body corporate” having capital stock “divided into shares of a par value of \$100 each.” Said banks are given general broad corporate powers such as the power to “use a corporate seal, to make contracts . . . TO SUE AND BE SUED, TO COMPLAIN AND TO DEFEND IN ANY COURT. . . .”

The Los Angeles Bank was substantially private owned, having 172 stockholder associations, owning \$5,971,500.00 of its voting capital stock. It had its main and only office in Los Angeles, where it was engaged in the banking business in California. None of the officers, directors, or stockholders of the Los Angeles Bank ever consented to its seizure or dissolution.

The assumption of the liabilities and assets of the Los Angeles Bank was not consented to, nor approved by the directors or stockholders of the Federal Home Loan Bank of Portland. [Exhibits 5, 6a, 6b, Minutes, Executive Committee, Federal Home Loan Bank of San Francisco, September 15, 1948, Clk. Tr. 14448-14499], and was repudiated by resolution of the stockholders, July 28, 1947 [Minutes, Stockholders Meeting—Apl. No. 12511, R. 3075].

2. SEIZURE OF THE SOLVENT LONG BEACH ASSOCIATION:

“The Federal Home Loan Administration on May 20, 1946, without notice or hearing, appointed Ammann conservator for the Association and he at once entered into possession.” (*Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030-1—1947.)

“That there is involved in this litigation the approximately \$26,000,000.00 of assets of the Long Beach Federal Savings and Loan Association which includes its approximately \$1,300,000.00 surplus when seized on May 20, 1946; and the approximately \$46,000,000.00 of assets, including its \$1,900,000.00 of surplus of the Federal Home Loan Bank of Los Angeles when it was seized on March 29, 1946; and the approximately \$9,000,000.00 of assets of the Federal Home Loan Bank of Portland and the assets of the combined Federal Home Loan Banks of Los Angeles and Portland, subsequently known as the Federal Home Loan Bank of San Francisco now allegedly amounting to approximately \$119,000,000.00. That the combined assets without duplication involved in this litigation amount to approximately \$145,000,000.00.” [Apl. No. 12511, R. 6454.]

3. CLASS ACTIONS COMMENCED MAY 27, 1946:

“That the above-entitled actions were filed and since have been maintained and prosecuted as Class actions; 5421-PH being originally filed on behalf of approximately 16,000 shareholder depositors of the Long Beach Federal Savings and Loan Association, and 5678-PH filed for all of the groups of Federal Savings and Loan Associations, State Building and Loan Associations and other financial institutions,

all members and stockholders of plaintiff Federal Home Loan Bank of Los Angeles.” [Apl. No. 12591, R. 292-293.]

4. ACTIONS CONSOLIDATED NOVEMBER 7, 1947:

“That the above actions, entitled Mallonee, et al. vs. Fahey, *et al.*, No. 5421-PH, and Los Angeles Bank, *et al.*, vs. San Francisco Bank, *et al.*, No. 5678-PH(WM) have heretofore been ordered consolidated for all purposes.”¹¹ [Apl. No. 12591, R. 291.]

5. GOOD FAITH AND REASONABLE GROUNDS:

“That said actions were and each of them was commenced and at all times since have been and now are being prosecuted and maintained by the plaintiffs therein, and each of them, through their respective counsel of record, in good faith and on reasonable grounds. . . .” [Apl. No. 12591, R. 291-292.]

6. CONGRESSIONAL COMMITTEE RECOMMENDATIONS—1946:

“. . . That evidence of said good faith and reasonable grounds is illustrated by, but not limited to, the

¹¹The appellants Home Bank Board reached the same conclusion. Chairman William K. Divers, by letter dated October 21, 1949, advised the Attorney General that:

“The Board is now satisfied that the bank litigation is so intertwined with the Long Beach case that a separate settlement is impossible during the pending litigation.” [Apl. No. 12511, R. 10882.]

findings, conclusions and recommendations¹² of the Special Committee Report of the United States Congress filed as an exhibit in the proceedings had upon the motion for attorneys' fees by the plaintiffs in said Action No. 5678-PH." [Apl. No. 12591, R. 292.]

7. INTERPLEADER—\$14,000,000.00 IN COURT:

"That in these actions¹³ in which have heretofore been filed numerous and sundry cross-claims, interventions, third-party pleadings, motions and petitions and other matters in interpleader or in the nature of

¹²The Congress of the United States caused an investigation of these confiscations to be made by the "Select Committee to Investigate Executive Agencies." After extensive hearings the Committee on July 25, 1946, recommended:

"(1) That the commissioner revoke the order reducing the number of districts from 12 to 11 in the Federal Home Loan Bank System.

"(2) That the commissioner take all necessary steps to reestablish a Federal Home Loan Bank of Los Angeles and a Federal Home Loan Bank of Portland, and revoke the order or orders by which the assets of these two district banks were intermingled."

(Page 27—House Report No. 2659, July 25, 1946, Tenth Intermediate Report of the Select Committee to Investigate Executive agencies—Investigation of Federal Home Loan Bank Administration—Federal Home Loan Bank of Los Angeles—Long Beach Federal Savings and Loan Association.) [Apl. No. 12511, R. 9107 to 9192 at 9173.]

¹³The \$14,000,000.00 was interpleaded into court in order to clear the titles of several thousand homes, clouded by the seizure and wholesale transfers and assignments of the seized assets.

The Los Angeles Bank, First Federal Savings and Loan Association, *et al.*, are plaintiffs in 5678-PH (below), and cross-claimants in 5421-PH (below). The appellees O'Melveny & Myers and Richard FitzPatrick, since August 22, 1946 [R. 564 in Apl. No. 12511], and W. I. Gilbert, Jr., since September 12, 1949 [Apl. No. 12511, R. 7191], have participated in these proceedings on their behalf and for their benefit, as said Appellees' respective attorneys of record.

the interpleader pursuant to which and under proceedings and hearings thereon, after notice duly given, there has been deposited in this court assets amounting to approximately \$14,000,000.00 which now remain in the registry of this court waiting disposition by further order, proceeding or adjudication of this court and which cannot be disposed of without order of this court. That said assets in the registry of this court are adequate to cover the allowance of attorneys' fees hereinafter made, without the requirement of the deposit of additional money or property." [Apl. No. 12591, R. 294.]

8. CLOUDED TITLES—CLEARED:

"The Federal Home Loan Bank of Los Angeles claims that its assets were illegally, unconstitutionally, and unlawfully, taken from its possession under said Orders Nos. 5082, 5083 and 5084, and were used totally or in part by the said Federal Home Loan Bank of San Francisco to make the advancements of cash made by said bank to defendant A. V. Ammann, evidenced by said four (4) notes, Exhibits 'F,' 'G,' and 'H,' and 'I,' in the said Noon Affidavit, totaling \$6,300,000.00 and that as a result thereof, the said San Francisco Bank holds said four (4) notes and any and all rights thereunder as a trustee of a constructive trust in favor of said Los Angeles Bank and that it, the said Los Angeles Bank, has a right to trace its assets into said notes, and into the claims arising therefrom against the collateral and other property of Long Beach Federal Savings and Loan Association, and against the Long Beach Federal Savings and Loan Association itself." [Apl. No. 12511, R. 8404-8405.]

“That in the transactions between the said defendants A. V. Ammann, purportedly acting as conservator for said Long Beach Federal Savings and Loan Association, and the defendant Federal Home Loan Bank of Portland, sometimes also known as the Federal Home Loan Bank of San Francisco, the said defendant A. V. Ammann, by written assignments on separate documents describing said thousands of deeds of trust, and by assignments upon the backs of each of the original notes therein concerned attempted to assign and transfer or pledge said thousands of notes and deeds of trust securing the same in which Long Beach Federal Savings and Loan Association was named as beneficiary.” [Apl. No. 12511, R. 8408.]

“That pending final judgment and decision of the various issues of the within consolidated actions neither said Long Beach Federal Savings and Loan Association, alone, nor said Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, alone, nor said Federal Home Loan Bank of Los Angeles, alone, nor any of the parties to this action can, without the aid and assistance of this court, make, execute and deliver to the said borrowers and homeowners an effective release, reconveyance and discharge of their real property.” [Apl. No. 12511, R. 8409.]

“That whatever ultimate right any of said present or future parties claimant may have to the proceeds of the said four (4) notes of \$6,300,000.00 face amount, are preserved by the deposit in court as herein required. That whatever injury may result by said deposit to any of the contending parties is so slight as to be heavily outweighed by the equitable considerations of the injuries which flow and which will continue to flow to the borrowers and purchasers

of properties conveyed by said deeds of trust, if said deposit were not so ordered. That among the injuries which would flow to said homeowners, and borrowers and purchasers by failing to require such deposit pending the final judgment in the within action, are (1) the inability of said thousands of borrowers and homeowners to secure a merchantable, or insurable title to the particular real property involved, which in turn would prevent either a sale thereof, or a loan or refinancing thereon, or a payment and termination of the interest and obligations of the present loans and deeds of trust thereon, and (2) a multiplicity of suits which might involve all of the issues raised, or which can be raised, in the instant litigation, and all of the parties to the present litigation; which injuries and damage are found to be grave, irreparable and continuing as to the thousands of borrowers and homeowners who have given their notes and deeds of trust to said Long Beach Federal Savings and Loan Association and conveyed the titles to their homes as security for said loans.” [Apl. No. 12511, R. 8410-8411.]

“That if such payment by said Long Beach Federal Savings and Loan Association of said sum to be made to one of said conflicting claimants to the exclusion of the other, and the other claimant thereafter would be held to have been entitled to such payment, then the owners of the various properties under trust deeds may each be subjected to claims upon their notes and property for a portion of such total liability, which possible liability exists as a cloud upon the title to each of the thousands of properties involved and prevents each of them from securing a merchantable and insurable title, unless the within Order is made. That the making of the within Order thus avoids the complex, multiple and conflicting

claims and demands which may be made upon the approximately 8,000 individual borrowers of said Association.” [Apl. No. 12511, R. 8412.]

9. INTIMIDATION:

“That there is evidence that certain defendants herein have by intimidation, sought to prevent and preclude plaintiffs herein and Associations of the class represented by them from obtaining the advice or services of counsel to protect the interests of said Association or to represent them in court. That said intimidation has ben evidenced by apparent threats of seizure if such Associations spent or appropriated funds for legal expenses or attorney fees in that the record discloses that on March 15, 1946, the Los Angeles Bank, by resolution, appropriated funds for legal expenses and attorney fees in connection with the investigation by the Sub Committee of the United States Congress and that defendant John H. Fahey was advised of such resolution on or about March 18, 1946, and that thereafter to wit, on or about March 29, 1946, said Los Angeles Bank was seized in the manner hereinbefore specified. That subsequent to the seizure of the Los Angeles Bank and prior to seizure of the Long Beach Federal Savings and Loan Association spot checks of the various Associations were made at the instigation of certain defendants herein for the purpose of ascertaining whether or not other Associations were making appropriations for the same purposes. That on May 8, 1946, the Long Beach Federal Savings and Loan Association appropriated funds by resolution for the purpose of employing counsel to conduct appropriate legal proceedings to restrain the Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of the affairs

of the said Long Beach Federal Savings and Loan Association, and that on May 20, 1946, the assets of the said Long Beach Federal Savings and Loan Association were seized without notice or hearing by, among others, the same defendants who seized the Los Angeles Bank. That in December, 1949, certain officers of plaintiff First Federal Savings and Loan Association were approached by representatives of certain defendants for the purpose of ascertaining whether or not the said Association had appropriated funds to pay its attorney in connection with the above proceedings. That said acts and conduct as herein described furnished and furnish reasonable ground for the plaintiffs in Action 5678-PH and the Associations represented by them to believe that if said Associations or any of them appropriated, or now appropriates, or uses their funds for purposes of defraying legal expenses or counsel fees that they might have been, or may likewise be, seized in the manner that the said Los Angeles Bank and Federal Savings and Loan Association of Long Beach were seized." [Apl. No. 12591, R. 295-297.]

10. DENIAL OF COUNSEL IS DENIAL OF DUE PROCESS:

"The within litigation has been pending since May 27th, 1946; it is of an extremely complex nature; all parties to the within proceeding on the allowance of attorneys' fees have proceeded with diligence and good faith to bring the multiple claims among the numerous parties in the actions in chief to issue; at least since May 10, 1949, if not from the inception of the litigation, all parties have proceeded on the basis that no fees would be collected by counsel in whose favor the above order runs except upon court order, after adversary proceedings; the matter of the entire litigation is proceeding in one phase or

another almost daily and requires the constant attention of counsel; the objections to the payment of the fees directed to be paid by the above order, were based entirely on matters of law which have heretofore been repeatedly urged upon and repeatedly rejected by this court and have been set forth in various findings, orders and judgments, reference to which is hereby made, from which judgments and orders either no appeal was taken, or the time for appeal has long since expired, or in some instances appeals were taken and later dismissed.

“In view of the foregoing it appears that it would be an abuse of discretion and a denial of the right to counsel, to grant a stay of the above order, and the same is denied, . . .”¹⁴

11. ATTORNEYS’ FEES TO BE JUDICIALLY DETERMINED
AS U. S. ATTORNEY AGREED:

“. . . That Attorney Peyton Ford, the Assistant to the Attorney General of the United States, as attorney for defendants, Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann and Federal Savings and Loan Insurance Corporation, on behalf of cer-

¹⁴On June 19, 1950, U. S. District Court denied stay of payment of these attorneys’ fees, except stayed for 10 days to enable appellants to apply to this U. S. Court of Appeals for the 9th Circuit, for a stay. (Designated by appellee Gilbert, but not printed, see Appendix pp. 1 to 3.) Stay denied, September 5, 1950, in this appeal No. 12591, C. C. A. 9.

Also see similar Findings Nos. 11 and 12 in Order Denying Stay of Payment of plaintiffs’ costs and attorneys’ fees from funds in the registry, *Mallonee v. Fahey*, No. 5421-PH, September 30, 1947 [Apl. No. 12511, R. 2464-78]. Stay denied, C. C. A. 9, December 8, 1947 [Apl. No. 12511, R. 2959-60], and Appeal No. 11751 dismissed February 6, 1948 [Apl. No. 12511, R. 3549-52].

tain defendants wrote and caused to be filed in the record a certain letter and which said letter was relied upon by counsel and the court, and which stated, in part, as follows:

‘(1) The attorneys’ fees, whether interim or final, shall be judicially determined in an adversary proceeding and the stipulation dated March 22, 1949, and the subsequent award of April 1, 1949, be vacated, or

‘(2) Following the suggestion of the court, one-third of the amount awarded by the court in its decision of April 1st shall be paid now on proper order of the court (less the deduction of \$50,000 previously paid, as provided in presently proposed order), regardless of the outcome of negotiations for settlement; the said stipulation and award shall be vacated and any further attorneys’ fees shall be judicially determined in an adversary proceeding at the conclusion of negotiations for settlement, if agreement thereon be reached, or in the litigation, if such there be, or .. .’

“That said letter was dated April 27, 1949, and was written by Attorney Peyton Ford, Assistant to the Attorney General of the United States, as attorney for the above-listed Defendants in connection with the request that counsel for the plaintiffs, Mallonee, *et al.*, and counsel for the Long Beach Federal Savings and Loan Association, and counsel for the Title Service Company and counsel for Robert H. Wallis, stipulate and agree that the Court’s announced order fixing an amount of approximately \$540,000.00 as an allowance on account of attorneys’ fees on account of services rendered, be vacated and set aside and that a new and different allowance on account in the

amount of only approximately one-third thereof be ordered and entered at said time.

“That a true and correct copy of said letter was ordered filed in the within proceedings by Order of this Court duly made and entered May 10, 1949. That this Court and the parties and all of them, relied upon said letter of said Attorney Peyton Ford, Assistant to the Attorney General of the United States, dated April 27, 1949.

“That in reliance upon said representations in the said letter dated April 27, 1949, and signed by Attorney Peyton Ford, Assistant to the Attorney General of the United States, as attorney for Defendants Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann, and Federal Savings and Loan Insurance Corporation, the said parties did so stipulate to the vacating of said priorly announced attorneys’ fee order, and in reliance thereon this Court did make and duly enter its Findings of Fact, Conclusions of Law and Order for Interim Allowances on Account of Attorneys’ Fees, prior to December 15, 1948, which Order was duly made and entered May 10, 1949, and which said Order and Judgment has now become final.¹⁵ . . .” [Apl. No. 12591, R. 297-300.]

¹⁵Right of Appeal was waived by appellants [R. 6542 in Apl. No. 12511] from said appealable “Order for Interim Allowance on Account of Attorneys’ Fees . . .” [R. 6527 in Apl. No. 12511]. Payment of approximately two-thirds of said previously judicially determined allowance on account of attorneys’ fees was withheld in reliance upon the Peyton Ford letter.

Said withheld two-thirds attorneys’ fees have not been paid, although the settlement negotiations pledged by Assistant Attorney General, Peyton Ford [Apl. No. 12511, R. 10744] have been repudiated by the Department of Justice and the Appellant Home Loan Bank Board. [Letter dated October 21, 1949, Apl. No. 12511, R. 10882.]

12. FUNDS OF ASSOCIATIONS ON DEPOSIT EXCEED ATTORNEYS' FEES:

"That the San Francisco Bank has in its possession, or in the registry of the court, funds of many Savings and Loan Associations, members of the class or classes represented by the Association plaintiffs, which said funds will include funds merely on deposit in said San Francisco Bank, and not held by said San Francisco Bank as collateral. That said funds herein described are substantially in excess of the allowance of attorneys' fees hereinafter made." [Apl. No. 12591, R. 295.]

13. \$100,000.00 LOS ANGELES BANK ASSETS USED BY SAN FRANCISCO BANK TO PAY ITS ATTORNEYS:

"That a portion of the books and records of San Francisco Bank reveal that out of the funds in the possession of the San Francisco and/or Portland Bank hereinbefore described and which funds consisted of assets of the Los Angeles Bank co-mingled with funds of the Portland Bank, the said San Francisco Bank has paid, for the purpose of resisting plaintiffs' claims, the sum of approximately \$100,000.00 to defray legal expenses and attorney fees in addition to indirect or other expenses not presently known."¹⁶ [Apl. No. 12591, R. 297.]

¹⁶Court approval has not been obtained for the payment of any of the San Francisco Bank expenses nor attorneys' fees.

The owners of 69% of the total votable outstanding shares of stock of the purported Federal Home Loan Bank of San Francisco have voted in writng "Against further use of Los Angeles Bank assets by the San Francisco Bank to litigate against Los Angeles Bank" while only 3.7% voted in favor.

Likewise 68% of the owners of said stock have voted "in favor of dissolution of said San Francisco Bank" and only 4.6% against [Apl. No. 12591, R. 695].

14. NO OBJECTION BY ANY STOCKHOLDER TO PAYMENT
OF LOS ANGELES BANK'S ATTORNEYS' FEES:

"That although due notice¹⁷ was given to each Association and person who could possibly be interested in the disposition of any money, either in court or in the hands of the San Francisco Bank, no person or Association so notified, or otherwise, has appeared to enter or make any objection or protest concerning the disposition of such funds, save and except those actually present in court through their counsel to wit: San Francisco Bank, Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann, and Federal Savings and Loan Insurance Corporation." [Apl. No. 12511, R. 291.]

SUMMARY OF FACTS.

(1) The Los Angeles Bank was denuded of funds with which to hire counsel. The summary seizure by the appellants of all of its \$46,000,000.00 of assets, and their commingling them with the \$9,000,00.00 of assets of the Portland Bank, gave the San Francisco Bank its assets of \$55,000,000.00 (then).

(2) The Stockholder member associations of the Los Angeles Bank were ~~intimidated~~ ^{INTIMIDATED} by fear of being seized by appellants from appropriating other funds to hire counsel to recover their bank and its seized assets (admitted finding 10).

(3) Approximately 5/6ths of the combined assets will be equitably ~~annulled~~ ^{OWNED} by these stockholders of the Los

¹⁷Notice of hearing of motion to allow attorneys' fees was given by publication and service by registered mail upon all stockholders of the Los Angeles, Portland and San Francisco Banks as per the court's order [Apl. No. 12511, R. 8920].

Angeles Bank as a class as stockholders in whichever Bank or Banks are ultimately determined to exist; otherwise the seizure was a theft.

(4) Whatever part of the \$14,000,000.00 in court is ultimately determined to be owned by the said Banks, at least 5/6ths of their aggregate interests will be owned equitably by the Los Angeles Bank Stockholders, as a class.

(5) To enable the Los Angeles Bank and its stockholders to be represented by counsel in this litigation, being prosecuted in good faith and upon reasonable grounds to recover their Bank and its assets, the District Court has allowed fees to their attorneys of approximately 1/7ths of 1% of their seized assets, payable from funds recaptured and now on deposit in the registry of the court. Only the seizing appellants object.

QUESTIONS PRESENTED.

These appellees disagree with the questions presented on pages 15 to 17 of appellants' opening brief; particularly, appellants' questions Nos. 1 to 5 which go to the merits of the case and are not decisive of the right to attorneys' fees. Decision of this appeal does not require a decision of the case on the merits before trial, although reversal might have that effect. The attorneys' fees appealed from were allowed by the Court below, for the purpose of a trial on the merits and a full hearing into constitutionality, statutory validity and fraud in the seizures by appellants.

Appellants seized without notice, hearing or trial and, for five years, have obstructed and prevented a hearing by

the Court below on the merits of the Los Angeles Bank seizure and confiscation. They seek by this appeal to evade such a trial on the merits by preventing counsel for appellees being enabled to try the action. Appellees believe the questions presented by this appeal are the following:

I.

DUE PROCESS AND RIGHT OF COUNSEL.

WHETHER THE RIGHT TO COUNSEL AND DUE PROCESS OF LAW CAN BE CUT OFF BY SUMMARY SEIZURE AND CONFISCATION OF ALL OF THE ASSETS OF THE SOLVENT \$46,000,000.00 FEDERAL HOME LOAN BANK OF LOS ANGELES.

II.

INTIMIDATION.

WHETHER APPELLANTS, BY THREATENING SEIZURE AND CONFISCATION OF SAVINGS ASSOCIATIONS (APPELLEES), CAN PREVENT PAYMENT OF COUNSEL AND THEREBY ESCAPE A COURT HEARING ON THE MERITS OF APPELLANTS' PREVIOUS SEIZURES AND CONFISCATIONS.

III.

INEQUITABLE USE OF SEIZED ASSETS.

WHETHER APPELLANTS SEIZING \$46,000,000.00 (THE ENTIRE ASSETS AND PROPERTY) OF THE LOS ANGELES BANK CAN USE IN EXCESS OF \$100,000.00 THEREOF FOR APPELLANTS' ATTORNEYS TO RESIST JUDICIAL DETERMINATION OF THE VALIDITY OF THE SEIZURE AND AT THE SAME TIME DENY TO THE STOCKHOLDERS, OWNERS OF THE SEIZED ASSETS, A \$75,000.00 ALLOWANCE ON ACCOUNT OF ATTORNEYS' FEES FOR PROSECUTING THIS "CLASS ACTION IN GOOD FAITH AND ON REASONABLE GROUNDS" FOR THE RECOVERY OF SUCH SEIZED ASSETS.

IV.

CAN APPELLANTS REPEAL CONGRESSIONALLY-
GRANTED RIGHT TO DEFEND.

WHETHER THE RIGHT TO "SUE OR BE SUED, COM-
PLAIN AND DEFEND . . ." EXPRESSLY GRANTED TO
APPELLEE LOS ANGELES BANK BY CONGRESS (12 U. S.
C. A. 1432) CAN BE CUT OFF BY PURPORTED INSTANTANE-
OUS SEIZURE, LIQUIDATION, CONSOLIDATION AND MER-
GER OF THE LOS ANGELES BANK BY APPELLANTS.

V.

COURT'S POWER TO ALLOW ATTORNEYS' FEES
IN INTERPLEADER.

WHETHER A UNITED STATES COURT IN WHOSE CUS-
TODY \$14,000,000.00 OF ASSETS HAVE BEEN DEPOSITED IN
INTERPLEADER CAN ALLOW \$75,000.00 (OR APPROXI-
MATELY 1/7TH OF 1%), AS ATTORNEYS' FEES, TO CLAIM-
ANTS TO SUCH ASSETS FOUND BY THE COURT BELOW
TO BE "PROSECUTING CLASS ACTIONS . . . IN GOOD
FAITH AND ON REASONABLE GROUNDS" FOR THE RE-
COVERY OF SUCH INTERPLEAD AND OTHER ASSETS AG-
GREGATING OVER \$46,000,000.00.

SUMMARY OF ARGUMENT.

The interim allowances of attorneys' fees appealed from
should be affirmed because:

I.

Denial of counsel is denial of due process.

Denial of counsel is unconstitutional whether caused by
physically excluding counsel from the court room or caused
by intimidation or by preventing compensation of counsel
and thereby denying counsel.

II.

Jurisdiction of the Court to allow attorneys' fees and jurisdiction over the parties and subject matter generally, is *res judicata*, final, and conclusive.

Appellants, by writs which were denied, and by appeals which were dismissed, have established, as the law of this case, the jurisdiction of the Court over appellants and over the subject matter in general, and specifically to allow attorneys' fees.

III.

The Court has jurisdiction in interpleader and otherwise over the approximately \$14,000,000.00 of assets in the Registry of the Court and can allow attorneys' fees therefrom.

The Court has jurisdiction to allow attorneys' fees from funds protected in class actions by stockholders of the seized corporations.

The Court can correct the inequities of appellants' using \$100,000.00 of the seized assets to prevent a trial on the merits of the seizures, by allowing to plaintiffs appropriate interim attorneys' fees from the seized assets in the Registry of the Court.

Assets, brought within the protective custody of the Court, either into the hands of a receiver or into the Registry of the Court, are protected or recovered for the benefit of all of the class beneficially entitled to ownership of such assets.

The Court into whose custody such assets are brought can allow counsel for plaintiffs their attorneys' fees from such assets.

The Court has jurisdiction to allow attorneys' fees to enable the Court to hear the case on the merits.

Certain phases of this litigation will require a determination of the case on the merits before a final determination can be made as to the jurisdiction of the Court.

IV.

A. Plaintiffs have standing to sue for recovery of assets physically within the territory of the Court and unconstitutionally or illegally seized by appellants.

Appellants' seizure, without notice, hearing or trial of the solvent, prosperous, and growing \$46,000,000.00 Los Angeles Bank was made without due, or any, process of law and is subject to judicial review in *in rem* actions to quiet title to, and recover possession of, the unconstitutionally and illegally seized and confiscated assets.

B. Appellants are not immune from suit because they commit their confiscations under the cloak of their official position. The actions, unconstitutional, beyond statutory authority, arbitrary, fraudulent, and malicious, are individual torts of the defendants and are not the acts of the United States.

C. The Administrative Procedure Act applies to all of appellants' orders, which are all reviewable.

D. There are no indispensable parties. No concurrence or action on the part of appellants is required for the payment of attorneys' fees, here appealed from. The Court below, after notice to appellants, has made his order upon his own clerk, to pay the money from the Registry of the Court. No action by appellants is necessary to effectuate the order nor can their non-consent prevent its enforcement.

E. The suit is not against the United States. The United States is not named as a party nor can appellants

hide their wrongdoings and torts behind the immunity of the United States because they may hold official positions. Their actions are unconstitutional, beyond statutory authority, and therefore void, and cannot be the acts of the United States.

V.

The Court's power to make interim allowances of attorneys' fees from assets in the protective custody of the Court in its Registry is not postponed until final termination of the litigation.

The Court can allow attorneys' fees to beneficiaries, suing or defending, to protect a trust, regardless of the outcome of the litigation, as long as the beneficiaries act "in good faith and upon reasonable grounds." The Court has found appellees are so acting and appellants do not attack that finding.

The assets are recovered at the moment they come into the protective custody of the Court, and allowances from such recovered assets can be made to the attorneys active in, or responsible for, such recovery.

It is not necessary to await final distribution of the funds from the protective custody of the Court in order to allow interim attorneys' fees on account, as compensation for the protection of the assets, achieved when taken into the custody of the Court.

VI.

This Honorable Court of Appeals should not attempt to decide the merits of this litigation before full trial and hearing in the Court below. A collateral appeal from an interim allowance of attorneys' fees is not a method to review, in advance of trial, what the trial court has not yet decided.

ARGUMENT.

I.

DENIAL OF COUNSEL IS DENIAL OF DUE PROCESS.

The right to counsel is a fundamental equal in rank to the right to notice and to hearing. Denial of counsel can occur just as effectively in litigation of this magnitude by confiscation of all assets of a party, as by excluding counsel from the court room.

The undisputed findings of the court show intimidation by appellants in an effort to prevent appellees having counsel to defend themselves from summary liquidation and confiscation. The frenzied resistance of these same appellants to every effort of counsel for the 16,000 depositors in the Long Beach Association for an award of compensation to prosecute the litigation, coupled with appellants' abandonment of the entire case immediately upon allowances of interim fees to counsel for such plaintiffs, is shocking. But when coupled with appellants' use of \$100,000.00 of the seized assets for their own attorneys to prevent a trial on the merits before the court below, the procedure becomes unconscionable.

In considering denial of counsel as denial of due process, the California District Court of Appeals, in:

Prudential Ins. Co. v. Small Claims Court, 173 P. 2d 38, 76 Cal. App. 2d 379 (1946) (hearing denied, California Supreme Court)

said:

“ . . . in both civil and criminal cases the right to a hearing includes the right to appear by counsel, and that the arbitrary refusal of such right constitutes a deprivation of due process. (Roberts v. Anderson, 10 Cr., 66 F. 2d 874; Powell v. State of

Alabama, 287 U. S. 45 [53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527]; *Cooke v. United States*, 267 U. S. 517 [45 S. Ct. 390, 69 L. Ed. 767]; *Steen v. Board of Civil Service Commrs.*, 26 Cal. 2d 716 [160 P. 2d 816] . . .)”

In *Steen v. Board of Civil Service Com'rs*, 160 P. 2d 816, 26 Cal. 2d 716 (1945), the California Supreme Court said:

“ . . . Here the board effectually denied petitioner the opportunity of making an objection by arbitrarily refusing to allow petitioner's counsel to participate in the proceeding. This was a denial of a hearing . . .”

In *Roberts v. Anderson*, 66 F. 2d 874 (1933), the U. S. Court of Appeals for the Tenth Circuit said at page 876:

“(7) The right to a hearing includes the right to the assistance of counsel of his own choice, if requested . . .”

Further at page 877:

“The right to be represented by counsel is a substantial one, and means what it says. It does not mean that chosen counsel shall appear by permission of, or insubordination to, counsel appointed without warrant of law . . .”

In *Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158 (1932), the U. S. Supreme Court said at page 68:

“ . . . the right to the aid of counsel is of this fundamental character.

“It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, . . . constitute basic elements of the constitutional requirement of due process of law . . .”

“What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . If in any case, CIVIL or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”

In the light of these decisions, let us consider the finding of the court below as to “due process.”

“The within litigation has been pending since May 27th, 1946; it is of an extremely complex nature; all parties to the within proceeding on the allowances of attorneys’ fees have proceeded with diligence and good faith . . . the matter of the entire litigation is proceeding in one phase or another almost daily and requires the constant attention of counsel; . . .

“In view of the foregoing it appears that it would be an abuse of discretion and a denial of the right to counsel, to grant a stay of the above order, and the same is denied, . . .”¹⁸ (Appendix pp. 1 to 2.)

¹⁸Such finding was contained in the order of the District Court denying stay of the order for payment of attorneys’ fees, involved in this appeal No. 12591. A ten-day stay was, however, granted to enable appellants to apply to this Honorable Court of Appeals for a stay of the District Court’s order for payment of attorneys’ fees on account.

This Honorable Court of Appeals, on the 5th day of September, 1950, likewise denied a stay of the District Court’s order for payment of attorneys’ fees on account.

II.

A. JURISDICTION OF THE COURT TO ALLOW ATTORNEYS' FEES, AND OVER THE PARTIES AND SUBJECT MATTER GENERALLY, IS RES JUDICATA, AS ESTABLISHED BY FINAL JUDGMENTS IN 1947, 1948 AND 1949.

In April of 1947, the District Court, after hearing upon notice, allowed to the plaintiffs, the Shareholders Protective Committee, representing the 16,000 depositors of the Long Beach Association, \$50,000.00 on account of attorneys' fees, and approximately \$17,000.00 on account of expenses [Apl. No. 12511, R. 2350-2363].

Before the signing of the formal order, the appellants filed proceedings for a writ of "mandamus, and/or prohibition, and/or injunction." Thereby, appellants made the District Judge a defendant in the United States Supreme Court because he had attempted to allow, from recaptured assets in the Registry of the District Court, funds to determine the validity of the summary seizure and confiscation of the Long Beach Association. Appellants sought, by said writs, to "prohibit any further allowance therein and to enjoin any payments heretofore allowed."

The United States Supreme Court denied the writs (*Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, June 23, 1947). In denying the writ, the United States Supreme Court had before it (printed in the District Court's "Return to Rule to Show Cause"), the District Court's proposed finding No. 2,

"That the Court has jurisdiction of the persons and subject matter involved." [Apl. No. 12511, R. 1448.]

After denial of the writs by the United States Supreme Court, the District Court signed its findings of fact, conclusions of law and order, including the same finding,

“That the Court has jurisdiction of the persons and subject matter involved.” [Apl. No. 12511, R. 1448.]

Appellants immediately applied to the District Court for a stay.

In denying such stay, the District Court found in part:

“. . . that the litigation is presently continuing, and unless the fees and expenses heretofore allowed be paid, the plaintiffs may be deprived of their rights to pursue the litigation to an ultimate judgment on the merits; and

“(12) It further appearing that the assertion of the rights and claims by the plaintiffs did require and does require that they and counsel take an active part in the litigation and in the incurring of enormous expense for the preparation of pleadings, (which in this case have been voluminous), multitudinous court appearances, for the preparation and printing of records and briefs on appeal, and other incidents to litigation; that it presently appears that the within action was commenced and is maintained by the plaintiffs in good faith for the avowed purpose of protecting and preserving the rights, interests, assets and properties in said association of themselves and others similarly situated, and that due process of law for ultimate justice requires a trial and determination on the legal merits, or both legal and factual if the issues are not disposed of on the legal merits alone, and that in view of the whole record and files herein it would amount to a denial of due process to compel plaintiffs to pay the

expenses and counsel fees heretofore allowed or to compel plaintiffs and counsel to await the final determination of the issues of said litigation for the payment of said fees and expenses] . . .” [Apl. No. 12511, R. 2464-2478.]

Appellants immediately applied to this Honorable Court of Appeals for a stay [Apl. No. 11751], and on December 8, 1947, after full briefing and argument, this Honorable Court of Appeals denied such stay. Thereafter on February 6, 1948, appellants dismissed their appeal, rescinded the appointment of the conservator of the Long Beach Association, ordered him to account with the District Court for the \$26,000,000.00 in cash, government bonds, negotiable securities, and other assets of the Association which he had seized without receipt or acknowledgment of any kind. [H. L. B. B. Resolution 388, Apl. 12511, R. 3404-3405.]

Such finding became *res judicata*, law of the case and final forever when appellants on February 6, 1948, dismissed their appeal No. 11751 from the judgment containing such finding of jurisdiction over the person and subject matter [Apl. No. 12511, R. 3549-3552].

The motive for dismissal of appeal has no effect on the finality of the judgment appealed from.

In *United States v. Munsingwear*, 340 U. S. 36, 95 L. Ed. 36 (1950), the U. S. Supreme Court said:

“ . . . There is no question but that the District Court in the injunction suit had jurisdiction both over the parties and the subject matter. And its judgment remains unmodified. . . . The question . . . having been determined in the first suit, is therefore laid at rest by a principle which seeks to

bring litigation to an end and promote certainty in legal relations.

“ . . .

“In this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights.

“ . . .

“The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation.

“Affirmed.”

The same principle was announced in the case of:

Stoll v. Gottlieb, 305 U. S. 165, 83 L. Ed. 104 (1938).

The Supreme Court said:

“ . . . Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter . . . ” (Emphasis added.)

and

“ . . . We see no reason why a court, . . . should examine again the question whether the court making the earlier determination on an ac-

tual contest over jurisdiction between the parties, did have jurisdiction of hte subject matter of the litigation . . .” (Emphasis added.)

In

Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 (1940) (U. S. Supreme Court) (affirming Court of Appeals for Ninth Circuit, 99 F. 2d 651),

the Supreme Court said:

“One trial of an issue is enough. ‘The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,’ as well to jurisdiction of the subject matter as of the parties . . .” (Citing authorities.) (Emphasis added.)

In

Baldwin v. Iowa Traveling Men’s etc., 283 U. S. 522, 75 L. Ed. 1244 (1931),

the Supreme Court said:

“. . . It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction . . . the special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. . . .”

the Supreme Court further said:

“. . . It had also the right to appeal from the decision of the Missouri District Court, . . . It elected to follow neither of those courses, but,

after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted

“Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. . . .” (Emphasis added.)

Other U. S. Supreme Court decisions to the same effect are:

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231 (U. S. Supreme Court, 1932) (an appeal from Court of Appeals, Ninth Circuit);

Chicot, etc. v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329 (U. S. Supreme Court, 1940).

The point of *res judicata* as to attorneys' fees, of course, has equal application to many other final judgments of the court below.

In the five years in which this litigation has been before the courts, the trial court has entered numerous judgments. Some of these final judgments are:

1. Expenses and fee order of 1947 (appeal dismissed) in appeal No. 12511, R. 2350.
2. Intervention orders clearing titles to realty (appeal dismissed) in appeal No. 12511, R. 2852.
3. Judgment to restore Long Beach Association, January 23, 1948 (no appeal), in appeal No. 12511, R. 3442 and 8310.

4. Order to deposit \$14,000,000.00 in assets, March 13, 1948 (no appeal—complied with) in appeal No. 12511, R. 3772 and 8399.
5. Order to release excess collateral (no appeal—complied with) in appeal No. 12511, R. 3869 and 8526.
6. Preliminary injunction of parties in Northern District action, No. 28203-G (no appeal—court recognized), in appeal No. 12511, R. 4722 and 8362.
7. Preliminary injunction and remand to State Court, action No. L.B.-C. 14492 (no appeal—court recognized) in appeal No. 12511, R. 5798 and 8377.
8. Order allowing appellees' expenses (final—not appealed) in appeal No. 12511, R. 6427.
9. Order allowing appellees' attorneys' fees on account (final—not appealed) in appeal No. 12511, R. 6527.
10. Order for substitution of Parties Plaintiff (final—not appealed) in appeal No. 12591, R. 219.

It is the law of this case that the U. S. District Court at Los Angeles has jurisdiction of the subject matter and of the parties, and this is *res judicata*. A full treatment of such judgments and the legal effect will be found in brief for appellee-plaintiff (Shareholders Protective Committee), pages 76 to 92, and in appellee Association's brief, in appeal No. 12511, pages 160 to 180.

B. THE COURT'S JURISDICTION IN INTERPLEADER BECAME FINAL AND CONCLUSIVE UPON EXPIRATION OF TIME TO APPEAL FROM THE INTERPLEADER ORDERS AND JUDGMENTS.

The assets physically in the registry of the Court, in the possession of the Court's Clerk, can leave such custody only by order or judgment of the Court. Once the judgment requiring deposit of such assets into the registry of the Court has become final and been complied with, there can be no further question as to the jurisdiction or power of the Court over such interplead assets. The U. S. Supreme Court in:

Dugas v. American Surety, 300 U. S. 414, 81 L. Ed. 720 (1937),

said:

"3. In the interpleader suit there was an actual, complete and judicially sanctioned payment . . . While the payment was into the court's registry, and not directly to the claimants, it nevertheless was a lawful and effective payment under the Interpleader Act. In effect the first decree converted the claims . . . into claims against the fund paid into the registry; . . .

". . .

"Plainly the court had jurisdiction of both the subject matter and the parties. No appeal was taken from either decree. Therefore Dugas was bound by both decrees. Had he exercised his right to appeal he could have obtained a review of the rulings on

his objection to being brought into the suit But these rulings were all made in the exercise of the court's jurisdiction, were subject to challenge and re-examination only on appeal, and became conclusive on him in the absence of an appeal." (Emphasis added.)

In affirming a decision of this Honorable Court of Appeals, the U. S. Supreme Court in the case of:

Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 (1940) (U. S. Supreme Court, 1940) (Affirming Court of Appeals for 9th Circuit).

"One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (Citing authorities.)

The power of the Court in interpleader over the assets of the San Francisco and Los Angeles Banks became final and *res judicata* upon expiration of the time for appeal from the order interpleading the assets. The only question now open on this appeal is whether or not the Court below committed error in allowing attorneys' fees. The question of the Court's jurisdiction to make such allowance is forever closed.

THE COURT BELOW HAS JURISDICTION IN INTER-
PLEADER, AND OTHERWISE, OVER THE AP-
PROXIMATELY \$14,000,000 OF ASSETS IN THE
REGISTRY OF THE COURT AND CAN ALLOW AT-
TORNEYS' FEES THEREFROM.

A. THE COURT HAS JURISDICTION TO ALLOW ATTORNEYS' FEES FROM FUNDS PROTECTED IN CLASS ACTIONS BY STOCKHOLDERS OF A SEIZED CORPORATION, SUING TO RECOVER THE CORPORATE ASSETS FOR ALL STOCKHOLDERS AS A CLASS.

1. The United States court of equity has inherent power to allow plaintiffs attorneys' fees, "as fair justice to the other party will permit."¹⁹

Both the U. S. Supreme Court and this Honorable Court of Appeals for the Ninth Circuit have repeatedly reversed the lower courts for failure to do justice between attorneys and litigants. Such reversal of lower courts has occurred when trial courts failed to equitably apportion attorneys' fees against or among both class beneficiaries and adversaries in equitable litigation.

A leading U. S. Supreme Court case is:

Sprague v. Ticonic Bank, 307 U. S. 161, 83 L. Ed. 1184, U. S. Supreme Court, 1939.

This case went from the district court to the Court of Appeals, to the Supreme Court and back, on several occasions.

¹⁹*Sprague v. Ticonic Bank*, 307 U. S. 161, 83 L. Ed. 1184, U. S. Supreme Court—1939.

Detailed analysis of that litigation discloses the following chronology and facts:

The appellant sued a National Banking receiver for recovery for herself only (and not on behalf of any class), for assets in the possession of the receiver, which appellant claimed were held as trustee by the bank for which the receiver was appointed.

The trial court granted judgment for recovery by plaintiff only of the trust assets claimed by her. While this judgment was yet pending undecided in the U. S. Supreme Court (certiorari was granted by the Supreme Court, October 18, 1937, and the case decided March 7, 1938), plaintiff, on February 19, 1938, filed a petition in the district court for allowances of counsel fees to plaintiff from assets in the hands of the receiver of the National Bank.

Plaintiff claimed right to counsel fees from all other claimants to similar trust assets in the hands of the receiver because her decision in favor of herself only inured to the benefit of their claims.

The application for fees, be it particularly noted, was filed before finality of plaintiff's judgment by affirmance by the U. S. Supreme Court.

The district court denied the petition for fees (23 Fed. Supp. 59), and the Court of Appeals affirmed such denial (99 F. 2d 583).

The U. S. Supreme Court, however, reversed both the Court of Appeals and the district court for denying attorneys' fees under these circumstances and, in an opinion (307 U. S. 161, 83 L. Ed. 1184), established the

inherent powers of federal courts, as courts of equity, to enforce and apply all of:

“ . . . that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, . . . ”

The U. S. Supreme Court further held that federal courts of equity have:

“ . . . the power not only to give a fixed allowance for the various steps in a suit, what are known as costs ‘between party and party,’ but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs ‘as between solicitor and client.’ . . . ” (Emphasis added.)

The U. S. Supreme Court also said:

“ . . . Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation . . . ” (Emphasis added.)

The U. S. Supreme Court further said:

“ . . . the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility. In the actual exercise of the power to

award costs 'as between solicitor and client' all sorts of practical distinctions have been taken in distributing the costs of the burden of the litigation . . ."
(Emphasis added.)

The power of a court of equity to do justice, "as between a party and the beneficiaries of his litigation," includes the power to allow attorneys' fees to a bank rendered helpless by summary seizure and confiscation of its entire assets, particularly when the seizure is without notice or hearing, is alleged to be a denial of due process and fair trial, and when the seizing parties have used in excess of \$100,000.00 of the seized assets in resisting judicial determination of the validity of the seizure.

The U. S. Supreme Court, in *Sprague v. Ticonic Bank*, *supra*, said in reversing:

"The decision of the Circuit Court of Appeals must be reversed so that the District Court may entertain the petition for reimbursement in the light of the appropriate equitable considerations." (Emphasis added.)

This Honorable Court of Appeals for the Ninth Circuit has repeatedly followed this leading Supreme Court decision and reversed lower courts either for failure to allow attorneys' fees or for inadequate allowances.

One of the leading cases in this Circuit is:

Monaghan v. Hill, 140 Fed. 2d 31 (C. C. A. 9, 1944).

A class suit was commenced against the Intermountain Building and Loan Association by several creditors as a class action for the benefit of all creditors and depositors. The U. S. District Court in Arizona appointed a re-

ceiver as a result of which "gross assets valued at more than \$2,000,000.00 passed into the hands of the receiver." One of the several attorneys involved applied to the District Court for an allowance on account of attorneys' fees, for traveling expenses, and for an allowance for a certified public accountant. Four expert witnesses, experienced attorneys, testified that \$200,000.00 was "a fair and moderate fee." The lowest estimate was \$150,000.00. "No testimony of a lower sum was introduced." The District Court allowed \$12,500.00 each to two attorneys. The District Court disallowed \$10,000.00 asked for the services of the accountant. One of the attorneys appealed. The other accepted the inadequate award of the District Court. This Honorable Court of Appeals reversed the inadequate award, and in so doing said:

"There is no question that a court can allow to attorneys in class suits, such as that conducted by petitioner and her co-solicitor, fees payable out of the funds recovered for the members of the class who accept the benefits of the attorneys' efforts, *New York Dock Co. v. The Poznan*, 274 U. S. 117, 121, 47 S. Ct. 482, 71 L. Ed. 955; *Trustees v. Greenough*, 105 U. S. 527, 533, 26 L. Ed. 1157; *Crump v. Ramish*, 9 Cir., 86 F. 2d 362, 363. The sum determined upon as constituting a just fee in such cases is largely within the discretion of the trial court and will not be modified on appeal unless there is strong evidence that the amount is excessive or inadequate. *Drilling & Exploration Corporation v. Webster*, 9 Cir., 69 F. 2d 416, 418; *Tracy v. Spitzer-Rorick Trust & Savings Bank*, 8 Cir., 12 F. 2d 755, 756; *Glidden v. Cowen*, 6 Cir., 123 F. 48, 51. *Cf. Dee v. United Exchange Bldg.*, 9 Cir., 88 Fed. 2d 372. . . .

“ . . . In our opinion, the very least award to appellant that could upon the evidence adduced be held to be reasonable is the sum of \$50,000. It is our opinion that the District Court arrived at the comparatively small sum of \$12,500 through error. *United States v. Equitable Trust Co.*, 283 U. S. 738, 746, 51 S. Ct. 639, 75 L. Ed. 1379; *Tracy v. Spitzer-Rorick Trust & Savings Bank*, 8 Cir., 12 F. 2d 755, 757; *Glidden v. Cowen*, 6 Cir., 123 F. 48, 51.

“ . . . We think the fee of the accountant is one of the necessary expenses chargeable against the fund in the hands of the receiver, and the sum of \$10,000 is reasonable in the premises.”

In so deciding, this Honorable Court of Appeals in effect ruled that \$100,000.00 was the minimum reasonable fee for litigation resulting in \$2,000,000.00 coming into the hands of a Federal receiver.

The unattacked findings of the court below demonstrates that there is \$14,000,000.00, not merely in the hands of a receiver, but in the Registry of the Court, in the custody of the Court's Clerk, brought there as a result of this litigation. The District Court has allowed \$75,000.00 attorneys' fees, from which allowance this appeal is taken. The \$14,000,000.00 is finally in the protective custody of the Court below and has been so protected since 1948. The time for appeal from the Order for deposit into the Registry of the Court has long since expired, and the order of deposit is *res judicata* and final. There can be no distinction between the authority of a U. S. Court to allow fees out of assets

in the hands of its receiver or in the hands of the Clerk of the Court. If anything, the power of the Court over funds in the custody of the Clerk of its Court is greater than over an ordinary equity receiver.

Another case in this Circuit is:

Crumph v. Ramish, 86 F. 2d 362 (C. C. A. 9, 1936)

which was the Sunset Oil Co. reorganization proceeding. Attorneys, representing unsecured bondholders, had intervened on behalf of the entire class of such unsecured bondholders. Later, the attorneys asked the Court to fix reasonable compensation for them. The reorganization agreement had provided that only \$25,000.00 attorneys' fees should be paid out of general assets but was without prejudice to an application to the Court for additional compensation to be ordered paid by the class represented by such attorneys.

The attorneys, in their petition, asked that 10% of the securities obtained by the class for whom they had litigated be paid to them as attorneys' fees.

"The (district) court denied the petition 'for want of jurisdiction or legal authority on the part of the Court to grant the same.' Appellants excepted to the order denying the petition and appealed therefrom.

"(1, 2) Unquestionably, the court has the power to allow compensation to the attorneys, to be paid by all in the class who accept the fruits of the labor of the attorneys." (Citing five U. S. Supreme Court, and five Circuit Court of Appeals decisions in support of the statement.)

Other cases upholding such equitable power of the Federal Court to award attorneys' fees are:

Tracy v. Spitzer, etc., 12 F. 2d 755 (C. C. A. 8, 1926);

Glidden v. Cowen, 123 Fed. 48 (C. C. A. 6, 1903);

Dee v. United Exchange Building, 88 F. 2d 372 (C. C. A. 9, 1937).

B. THE COURT HAS PERSONAL JURISDICTION OVER APPELLANTS BY EXPRESS AGREEMENT OF THE ATTORNEY GENERAL OF THE UNITED STATES.

The Court has personal jurisdiction to allow attorneys' fees by express agreement of the Attorney General of the United States that "any further attorneys' fees shall be judicially determined in an adversary proceeding . . .," which agreement was filed with the Court below and relied upon by the Court and counsel.

In December of 1948, Harold Holmes, prominent in the Savings and Loan field and a practicing lawyer of the San Francisco Bay area, was elected President of Appellant San Francisco Bank for the announced and express purpose of restoration of the Los Angeles Bank and dissolution of the San Francisco Bank. Appellant, Home Loan Bank Board, had approved his election for this purpose and had announced that the litigation was compromised and the San Francisco Bank was to be dissolved and the Los Angeles and Portland Banks restored.

As part of such settlement proceedings, a determination of attorneys' fees for various counsel for the Long Beach Association was to be made by the Court below. Appropriate proceedings were had to bring the matter on for hearing before the Court below, and after several hearings at which no objections were made by any of

the stockholders or depositors of any of the institutions involved, a total of \$540,000.00 was announced by the Court below, as the amount for attorneys' fees for various counsel in the litigation. Thereafter, appellants "changed their minds," and Assistant Attorney General Peyton Ford came from Washington, D. C., to Los Angeles and stated to the Court:

"Mr. Ford: We are here in the interests of the Board because they have changed their mind on certain things . . .

"Mr. Ford: If the Board changes its mind again they might lose a lawyer." [Apl. No. 12511, R. 10737.]

(Mr. Ford has since resigned as the Assistant to the Attorney General of the United States.)

Appellants threatened to repudiate the settlement to which they had previously agreed unless said award of attorneys' fees was vacated and set aside. The litigation was then almost three years old, and counsel in whose favor the Court had made its award of attorneys' fees placed their clients' interest above counsel's own personal interest and, relying upon representations and guarantees made to the Court and to counsel by said Peyton Ford, Assistant to the United States Attorney General, consented to vacation and setting aside of the Court's award of attorneys' fees. Such consent was upon the terms and conditions of a letter filed with the Court and made part of the record, and relied upon by the Court and counsel.

The Court made a complete finding on this matter and that finding is not attacked by the appellants on this appeal. Said letter reads in part as follows:

"The said stipulation and award shall be vacated and any further attorneys' fees shall be judicially

determined in an adversary proceeding at the conclusion of negotiations for settlement if agreement thereon be reached or in the litigation if such there be." (Appendix, p. 5.)

The Court has found "that in reliance upon said representations in the said letter . . . this Court did make and duly enter its findings of fact, conclusions of law, and order for interim allowance on account of attorneys' fees . . . and which said order and judgment has now become final."

The said letter of Peyton Ford read at the commencement thereof: "Re Paul Mallonee, *et al.* vs. John H. Fahey, *et al.*, No. 5421-P. H. Civil and Consolidated Case No. 5678-P. H. Civil." The words "any further attorneys' fees shall be judicially determined . . . in the litigation . . ." signed by the second highest in the Attorney General's office of the United States clearly and expressly consented to personal jurisdiction over appellants and authorized the Court to make the "judicial determination" incorporated in the award of attorneys' fees here appealed from.

All questions of indispensable parties, lack of jurisdiction over the person, and similar matters, at least insofar as attorneys' fees are concerned, are, by the very terms of this letter signed by the Assistant Attorney General and filed with the Court, forever removed from this case.

There remains only the question of such objections on the merits as appellants might have cared to raise in the Court below. Clearly they cannot raise for the first time

on this appeal, any questions not presented to the Court below on the merits. In the Court below they made no factual objections whatsoever.

“The Court: I had not noticed it in the Government’s objection, that there was no objection either to the value of the services, that is, having any value, nor the fact that the services were rendered * * * Do you raise any question of fact?

Mr. Angell: Not as to the value of the services.

The Court: Or the rendition?

Mr. Angell: Or the rendition.”²⁰ [Apl. No. 12591, R. 348-349.]

They admitted that the services had been rendered and they did not question the value. Attorney Hubert Morrow, a qualified expert, testified the reasonable value of the services rendered was \$175,000.00. There was no evidence to the contrary. [Apl. No. 12591, R. 356.]

C. THE COURT HAS JURISDICTION TO ALLOW ATTORNEYS’ FEES TO ENABLE THE COURT TO HEAR THE CASE ON THE MERITS.

Jurisdiction of the Court can be determined only by a proceeding before the Court below. At such proceeding, the Los Angeles Bank and its plaintiff stockholders must, of necessity, be represented by counsel. The extent and length of the hearing by which the court below determines its jurisdiction may extend to an entire trial on the merits of the litigation.

In litigation against government officials, decisions of the merits must often be made before decision as to juris-

²⁰Mr. Angell is attorney for appellants.

diction can be reached. Such was the holding of the United States Supreme Court in:

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209 (1947),

wherein the Supreme Court said:

“ . . . this is the type of case where the question of jurisdiction is dependent on decision of the merits.

“The allegations of the complaint, if proved, would establish that petitioners are unlawfully without respondents’ property under the claim that it belongs to the United States. . . .”

“ . . . But public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen’s realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld. . . .

“We intimate no opinion on the merits of the controversy. We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits.” (Emphasis added.)

The District Court, in 1949, stated in Conclusion No. 4 [Apl. No. 12511, R. 8297], as follows:

“That some of the issues in the main litigation involved, will require a determination of the case on its merits, before a final determination can be made as to the jurisdiction of this Court with relation to certain situations and phases of the litigation, which raise the question of jurisdiction.”

In

American Surety Co. v. Baldwin, 287 U. S. 156,
77 L. Ed. 231, U. S. Supreme Court, 1932 (an
appeal from Court of Appeals, Ninth Circuit),

the United States Supreme Court said:

“The Supreme Court of Idaho had jurisdiction
over the parties and of the subject matter in order
to determine whether the trial court had juris-
diction”

In

Baldwin v. Iowa Traveling Men's, etc., 283 U. S.
522, 75 L. Ed. 1244 (1931),

the Supreme Court said:

“. . . it is of no moment that the appearance
was a special one expressly saving any submission
to such jurisdiction. . . . The special appear-
ance gives point to the fact that the respondent
entered the Missouri court for the very purpose of
litigating the question of jurisdiction over its per-
son. It had the election not to appear at all. . . .”
(Emphasis added.)

Denial of right of counsel to represent the seized Los Angeles Bank and its stockholders might enable the San Francisco Bank, which has already expended \$100,000.00 of the seized assets in preventing the trial on the merits, to escape liability to account for the seized assets by exhausting Los Angeles Bank counsel in a five-year contest over jurisdiction of the Court to decide the case on the merits.

IV.

THE CONSOLIDATED ACTIONS PRESENT APPROPRIATE CLAIMS FOR EQUITABLE RELIEF, WHICH HAVE ALREADY RESULTED IN FINAL JUDGMENTS DISPOSING OF A PORTION OF THE ISSUES.

A. PLAINTIFFS CAN MAINTAIN JUDICIAL REVIEW FOR CORRECTION OF UNCONSTITUTIONAL OR ILLEGAL SEIZURES OF PROPERTY PHYSICALLY WITHIN THE TERRITORY OF THE COURT.

The actions are *in rem* to quiet title to, to recover possession of, and for an accounting concerning, \$46,000,000.00 of assets of the seized Los Angeles Bank, and \$26,000,000.00 of the seized Long Beach Association. The majority of such assets consist of notes and trust deeds, pledges of security, government bonds, and other tangibles.

The District Court has found,

“That all of the assets, and properties, herein described, notes, deeds of trust, United States Government Bonds, and other collateral are physically within the confines and boundaries of the Southern District of California and are thus physically within the jurisdiction of this Court . . . That all of the thousands of parcels of real property, homes of the borrowers of Long Beach Federal Savings and Loan Association specifically described in said deeds of trust herein elsewhere described in detail are situated within the confines of the Counties of Los Angeles and Orange, State of California, all physically within the boudaries of the Southern District of the said United States District Court.

“That all of the United States Bonds hereinafter specifically described are physically located at the Los

Angeles Branch of the Federal Reserve Bank of San Francisco, in the City of Los Angeles, County of Los Angeles, State of California, within the confines of, and boundaries of, the United States District Court for the Southern District of California.” [Apl. No. 12511, R. 8412-8525.]

No appeal was ever taken from these findings. They are, therefore, final and conclusive. The issues of this litigation are: who owns, and who is entitled to the possession of, these assets—the Los Angeles Bank and the Long Beach Association, from whom they were physically seized, without notice or trial or the San Francisco Bank, which claims title and possession to such assets under the administrative orders, No. 5082, No. 5083 and No. 5084. [Apl. No. 12511, R. 8225.]

These orders read in part:

“All assets and property of any kind or nature of such bank . . . are hereby transferred to . . .”

the San Francisco Bank.

To say that the owners of over \$70,000,000.00 of seized assets cannot even apply to the Courts to determine the validity of confiscation of such assets by executive fiat, claimed to be in excess of statutory authority, is to deny the constitutional guarantees of due process.

The U. S. Supreme Court in *Marx v. Hanthorn*, 148 U. S. 172, 37 L. Ed. 410 (U. S. Supreme Court, 1893) said:

“A statutory power, to be validly executed must be executed according to the statutory directions . . .

“. . . We think the conclusion reached by the courts generally may be stated as follows: . . .

that the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land."

Ownership of property, the right to corporate existence, stockholders rights in a corporation which they organized and created, do not all exist or perish, dependent upon the pleasure or whim of an administrative official. The ownership of \$46,000,000.00 does not disappear over night at any time that a Commissioner decides to transfer ownership and possession to a palace favorite.

Due process of law requires notice, hearing, trial, and court review before confiscation of property and corporate death can be decreed; nor can instantaneous dissolution of the corporate owners foreclose and preclude the rights guaranteed under the Constitution.

In

Joint Anti-Fascist v. McGrath, 341 U. S. 123, 95 L. Ed. 817 (1951),

the United States Supreme Court devoted 90 pages to consideration of due process, as applying to actions of the Attorney General in, without notice or hearing, listing certain organizations as communistic.

Appellants there raised, as do appellants here, the question of "standing to maintain the suit," "non-reviewability of administrative orders," etc. The various opinions of the Justices in concluding that the action was arbitrary and unconstitutional, if done without notice and hearing, point the road to decision of this appeal.

Mr. Justice Burton said at page 136,

“ . . . An ‘appropriate’ governmental ‘determination’ must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of ‘determination.’ It is implicit in a government of laws and not of men. Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it.”

Mr. Justice Black said at page 143,

“ . . . I agree with Mr. Justice Frankfurter that the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and a fair hearing . . . ”

Mr. Justice Frankfurter said at page 154,

“ . . . The fact that an advantageous relationship is terminable at will does not prevent a litigant from asserting that improper interference with it gives him ‘standing’ to assert a right of action . . . ”

Further, on page 162,

“ . . . ‘Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts.’ Southern R. Co. v. Virginia, 290 U. S. 190, 199, 78 L. Ed. 260, 266, 54 S. Ct. 148. . . . ”

Further, at page 171,

“ . . . ‘The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.’ . . . Appearances in

the dark are apt to look different in the light of day. . . .”

Mr. Justice Douglas said at pages 177, 178,

“ . . . When the Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. . . . Notice and opportunity to be heard are fundamental to due process of law. We would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil. . . . The rudiments of justice, as we know it, call for notice and hearing—an opportunity to appear and to rebut the charge.”

B. APPELLANTS ARE NOT IMMUNE FROM SUIT.

Appellants contend that because they hold official positions in the Government of the United States, they are immune from all Court action.

The complaints allege that the action of appellants is both unconstitutional and beyond their statutory authority, as well as arbitrary, fraudulent, and malicious. In effect, appellants say that they can violate the Constitution, act without authority, and do so fraudulently and maliciously, and yet no Court can curb them or keep them within constitutional or statutory bounds.

The Administrative Procedure Act, discussed at length at pages 205 to 220 of the brief of appellee Long Beach Federal Savings and Loan Association and at pages 59 to 71 of the brief of appellee, plaintiff (Shareholder Committee) in Appeal No. 12511, together with the cases there

cited, discloses that such immunity from suit does not exist.

Section 10(e) of said Act, Title V, U. S. C. A., Section 1009(e), reads in part as follows:

“(e) SCOPE OF REVIEW. . . . the reviewing court shall . . . (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; . . .”

In

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209 (1947),

the U. S. Supreme Court said:

“. . . But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld . . . (Emphasis added.)

In

Keifer v. R.F.C., 306 U. S. 381, 83 L. Ed. 784,
U. S. Supreme Court (1939),

the U. S. Supreme Court held government corporations liable for damages for negligence.

In

F. H. A. v. Burr, 309 U. S. 242, 84 L. Ed. 724,
(1940),

the Federal Housing Administrator was held liable to garnishment under process of a state court.

In

R.F.C. v. Menihan, 312 U. S. 81, 85 L. Ed. 595
(1941),

the U. S. Supreme Court held the R.F.C., a wholly government-owned corporation, liable for costs and allowances, and said,

“ . . . The additional allowance made by courts of equity in accordance with sound equity practice is likewise such an incident. *Sprague v. Ticonic Nat. Bank*, 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777 . . . ”

“ . . . We think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances.” (Emphasis added.)

Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777, discussed herein at length on page 45, is a decision of the U. S. Supreme Court,

imposing attorneys' fees against the funds of a whole class for whose benefit the plaintiffs' litigation was prosecuted. The allowance of attorneys' fees against appellants San Francisco Bank and Federal Savings and Loan Insurance Corporation, both "sue or be sued" corporations, is expressly approved by the citation in *R.F.C. v. Menihan*, 312 U. S. 81, 85 L. Ed. 595, of *Sprague v. Ticonic Nat. Bank*.

C. APPELLANTS' ORDERS ARE ALL REVIEWABLE.

Appellees Long Beach Association's brief, in Appeal No. 12511, pages 220 to 250, deals at length with reviewability of appellants' orders. The U. S. Supreme Court, only this year, held in:

Universal Camera Corp. v. N.L.R.B., 340 U. S. 474, 95 L. Ed. 456 (1951),

and

N.L.R.B. v. Pittsburgh Steamship Co., 340 U. S. 498, 95 L. Ed. 479 (1951),

that the Administrative Procedure Act applies to judicial review of administrative action taken before the effective date of that Act.

The issues of this litigation include unconstitutionality of the statute, and the action taken under it, as well as the allegation that the action is beyond statutory authority and is arbitrary, malicious, and fraudulent.

An order made without due process is utterly void. The question is not merely one of review but whether the orders legally and constitutionally exist. Neither Congress nor the Executive can confer authority to violate the Constitution or to act beyond the scope of statutory authority.

D. THERE ARE NO INDISPENSABLE PARTIES.

Appellee Long Beach Association's brief, in Appeal No. 12511, pages 250 to 265, deals at length with indispensable parties.

There are no indispensable parties in an action *in rem*. The Court disposes of the property within its jurisdiction, and particularly in the possession of the Court's own Clerk, on deposit in the Court's Registry.

Appellants received their notice. They appeared before the Court and objected to the allowances of the attorneys' fees, and their objections were overruled.

The Court does not need appellants' consent nor any personal jurisdiction over appellants when the Court makes an order to the Court's own Clerk to pay out funds in the Registry of the Court.

In

Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95 (Dec., 1947),

the U. S. Supreme Court, in passing on an appeal from this Honorable Ninth Circuit Court of Appeals, discussing an order of the District Court at Los Angeles to the Postmaster at Los Angeles, said:

“ . . . No concurrence on his part is necessary to make lawful payment of the money orders and release of the mail unstamped. Yet that is all the court is asked to command. Reversed.”

No act of the Washington appellants is required when the District Court orders the clerk to pay out of the Registry, assets in the custody of the Court.

In

Hynes v. Grimes Packing Co., 337 U. S. 86, 93
L. Ed. 1231 (May, 1949),

the U. S. Supreme Court affirmed this Honorable Court of Appeals for the Ninth Circuit and said:

“ . . . Nothing is required of the Secretary; he does not have to perform any act, either directly or indirectly . . . No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek. The issues of the instant suit can be settled by a decree between these parties without having the Secretary of the Interior as a party to the litigation.”

Appellants' summary orders No. 5082, No. 5083, and No. 5084 [Apl. No. 12511, R. 8225] purported to transfer the title of the Los Angeles Bank's assets to the San Francisco Bank. Aside from appellants' orders, the San Francisco Bank has no existence. \$14,000,000.00 of the assets appellants seized are now in the Registry of the Court. Appellants do not deny that they received due notice, made such objections as they desired and were heard. Appellants are in no sense indispensable.

They can come to the Court where the assets are and make their claims, or they can abandon the assets and let the Court proceed; but they cannot by remaining in Washington, D. C., prevent this Court in Los Angeles from acting upon funds in the Registry of its Clerk at Los Angeles.

Appellants seek to exercise authority over the ownership of real property in California and themselves transfer that ownership from the Los Angeles Bank to the

San Francisco Bank. Yet, when the Court below makes an order on the Clerk of the Court for the payment of attorneys' fees to contest the validity of such transfers of title, they deny to the Court the very powers they claim for themselves.

In other words, they seek to be in California to affect ownership of the California real estate, but not in California when the Court is to determine the validity of their transfers of trust deeds on that very real estate; in Court enough to object to the payment of attorneys' fees from funds in the Registry of the Court, but not sufficiently in Court to be bound by the Court's judgments in so doing.

E. THE SUIT IS NOT AGAINST THE UNITED STATES.

The United States ^{is} not a party to any of these proceedings, although appellants have attempted to cloak their unconstitutional, illegal, arbitrary, and malicious acts, as the acts of the United States. If the act is unconstitutional, unlawful, and unauthorized, it can only be the individual act of the appellants and not an act of the United States. If the act is constitutional and valid and lawful, it is, or may be, the act of the United States, but neither of these is a matter which can be determined until the trial of the issues on the merits.

By seeking to hide behind the immunity of the United States, appellants are attempting to prevent an inquiry by the Court into the constitutionality, validity, and statutory authority of what they did. In effect, they seek to prevent a trial by saying they are beyond all Courts, regardless of what they do.

V.

THE COURT'S POWER TO MAKE INTERIM ALLOWANCES OF ATTORNEYS' FEES IS NOT POSTPONED UNTIL A SUCCESSFUL TERMINATION OF THE LITIGATION.

In

Eggert v. Pacific States Savings & Loan Co., 53
Cal. App. 2d 554 (1942),

depositors of Fidelity Savings & Loan Company sued the Building and Loan Commissioner, and Pacific States Savings & Loan Association, for recovery of assets exclusively for the benefit of Fidelity's depositors. Attorneys for Pacific States defended and lost the litigation. The trial court awarded attorneys' fees both to Fidelity and Pacific States' attorneys. The order in favor of Pacific States' attorneys was appealed. It was affirmed by the California District Court of Appeal which said:

" . . . It is the general rule that, where for any reason a trustee fails to protect trust assets from adverse claims, a beneficiary may do so and may be awarded counsel fees out of the trust assets, if the defense is conducted in good faith and on reasonable grounds. (*Trustees v. Greenough*, 105 U. S. 527, 532 [26 L. Ed. 1157]; see, also, *Beach on Trusts and Trustees* (1897), vol. 2, 1599, §698.) See, also, for the application of the same principle to an analogous situation. (*Anderson v. Great Republic Life Insurance Co.*, 41 Cal. App. (2d) 181, 190 [106 P. (2d) 75].) A different rule does not apply, even though

the beneficiary is unsuccessful in the litigation. (Dingwall v. Seymour, 91 Cal. App. 483, 513, [267 Pac. 327].)”

In *Winslow v. Ferguson*, 153 P. 2d 714, 25 Cal. 2d 274 (1944), the California Supreme Court reaffirmed the power of a court to allow attorneys’ fees for bringing assets into the protective custody of the Court. The action was commenced in 1931. In 1934, the Court ordered payment of “not less than \$500.00” to attorneys for plaintiffs suing in a class action for all beneficiaries of the trust.

It was not until 1940 that the receiver was made permanent for the purpose of liquidating the trust. In 1941, a further allowance of attorneys’ fees was made a prior lien on the trust assets in the custody of the Court. In 1942, the Court attempted to give general creditors of the trust priority over the award of attorneys’ fees. The attorney was absent in military service and upon his return appealed from the order making the attorneys’ fees inferior to the creditors’ claims. The Supreme Court of California reversed and said (p. 719):

“ . . . Where a lawyer has rendered such valuable service as to make available a fund for a class, even though he appeared for only one claimant, it is equitable that his compensation and expenses should come from the entire fund saved for all classes concerned before it is distributed. (*Sprague v. Ticonic Nat. Bank*, 307 U. S. 161, [59 S. Ct. 777, 83 L. Ed. 1184].) . . .

“It would be wholly out of line with the traditional concept of equitable practice to pay the expenses of a receiver and the fees of his counsel prior to the participation of any creditor or beneficiary and at the same time to subordinate the payment of fees to the attorney who has invoked the powers of the court of equity to appoint that same receiver. The expense incurred by a litigant for legal services in causing the appointment of a receiver is as much an expense of administration as the charge of the receiver’s counsel and should have priority to the same extent. (Farmer’s Loan & Trust Co. v. Green, 5 Cir., 79 F. 222, 24 C. C. A. 506; Muskegon Boiler Works v. Tennessee Valley I. & R. Co., D. C., 274 F. 836; McLane v. Placerville & Sacramento Valley R. Co., 66 Cal. 606, 622, 623, 6 P. 748.) . . .

“Not only is it established that the litigant is entitled to be compensated for the expense he has incurred in the prosecution of such an action, but there is created in favor of the attorney who renders the service an equitable lien against the fund so preserved. Central R. & B. Co. v. Pettus, 113 U. S. 116, 5 S. Ct. 387, 28 L. Ed. 915; Colley v. Wolcott, 8 Cir. 187 F. 595, 109 C. C. A. 425; Muskegon Boiler Works v. Tennessee Valley I. & R. Co., D. C., 274 F. 836.

“. . . That certain beneficiaries of the trust undertook to institute the action necessary to preserve the trust assets, and another beneficiary intervened for the same purpose, are but formalities of the litigation which do not affect points of substance herein.”

In *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, in this very litigation, the U. S. Supreme Court in 1947 said:

“ . . . an allowance of \$50,000 will hardly wreck a \$26,000,000 institution during the time it would take to prosecute an appeal.”

and at the same time in *Fahey v. Mallonnee*, 332 U. S. 245, 91 L. Ed. 2030 (1947), the U. S. Supreme Court reversed a judgment for removal of the conservator and restoration of the Association. In so doing, the Supreme Court said:

“Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.”

The U. S. Supreme Court further said:

“It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, and we make no determination or intimation concerning the merits of these issues or as to other remedies or relief than that in the judgment before us.”

By their two decisions, announced simultaneously, the U. S. Supreme Court directed a trial on the merits and

made adequate provisions that plaintiffs should be financed to pay their counsel for such trial.

If the district court was without power to allow fees prior to final judgment, would the Supreme Court of the United States have refused a writ of prohibition, and would this Honorable Court of Appeals, in December of 1947, denied a stay of the same order that the Supreme Court had refused to prohibit?

The only question in this present appear from attorneys' fees is whether or not the litigation should be tried.

The District Court before whom it has been pending for more than five years has found that these actions

“ . . . are being prosecuted and maintained by the plaintiffs therein, and each of them, through their respective counsel of record, in good faith and upon reasonable grounds.”

The appellants have not attacked this finding in any way, nor pointed to any evidence contrary thereto.

The Congressional Investigating Committee in 1946 condemned the seizures of the Los Angeles Bank and recommended its immediate restoration.

No just cause has been shown for reversal of this award thereby denying plaintiffs the right to counsel, to a hearing, and to a trial on the merits in the court below.

VI.

A. LITIGATION OF THIS MAGNITUDE, INVOLVING
THE CONSTITUTIONAL GUARANTEES OF THOU-
SANDS OF DEPOSITORS IN HUNDREDS OF SAV-
INGS INSTITUTIONS, SHOULD NOT BE DECIDED
UPON A COLLATERAL ISSUE PRIOR TO FULL
HEARING ON THE MERITS.

Appellants, by a series of appeals of subsidiary or preliminary questions, seek to escape a full hearing on the merits in the court below, and urge upon this court, in appeals from preliminary injunction, appeals from interim allowances of attorneys' fees, and appeals from interim allowances of special master fees, and other collateral issues, a consideration of this voluminous record, before final decision of all of the issues. Appellants make these efforts notwithstanding their failure to appeal from previous final judgments disposing permanently of portions of the litigation.

The U. S. Supreme Court has refused to permit piecemeal appeals to dispose of major issues in advance of a trial on the merits.

In

Deckert v. Independence Shares Corp., 311 U .S.
282, 85 L. Ed. 189 (1940)

the U. S. Supreme Court said:

"It is enough at this time to determine that the bill contains allegations which, if proved, entitle petitioners to some equitable relief. Whether or not they sufficiently allege or prove their right to all of the relief prayed in the bill we do not decide because the question is not before us. . . .

“ . . . The Circuit Court of Appeals properly did not consider them on the merits, and if ultimately there is an appeal from a final decree the correctness of these orders may be examined.” (Emphasis added.)

In

Munoz v. Porto Rico Ry. Light & Power Co., 83 Fed. 2d 262; (C. C. A. 1, 1936) (Certiorari denied 298 U. S. 689, 80 L. Ed. 1408-1936)

the Circuit Court of Appeal for the First Circuit said:

“The appellant sets out 10 assignments of error. They all go to the merits of the controversy, and could very properly be discussed if the case were here after a full hearing . . .”

“Where questions both of law and facts are involved and the trial court in its discretion has issued a temporary injunction to preserve the *status quo* until these questions can be presented on final hearing, this court on appeal will not undertake to find the facts or to lay down rulings on specific issues . . .” (Emphasis added.)

In

Publicity, Etc. v. Collector Internal Revenue, 139 F. 2d 583 (C. C. A. 8, 1943)

the Circuit Court of Appeals for the Eight Circuit said:

“ . . . The Federal Rules of Civil Procedure do not sanction the disposition of doubtful issues of fact or law upon motions to dismiss for insufficiency of pleadings. The Rules contemplate a determination of all such issues by the trial court after a hearing, and that the trial court shall make findings of fact and conclusions of law, to the end that the parties

to the litigation and the reviewing court may know the exact factual and legal basis for the trial courts' decision . . .

“(4) While we shall not, upon this appeal, express any opinion as to the merits of this case, we consider it important that the usefulness of the statutory remedy of interpleader, which has been greatly liberalized by the Interpleader Act of 1936 and by Rule 22 of the Federal Rules of Civil Procedure, shall not be impaired by narrow and restrictive rulings which might prevent bona fide claimants, with meritorious claims to a fund deposited by a stakeholder, from securing an adjudication of their rights . . .” (Emphasis added.)

In

Montgomery Ward & Co. v. Langer, 168 F. 2d 182 (C. C. A. 8, 1948),

the Circuit Court of Appeals for the Eighth Circuit said at page 186:

“. . . It is not for an appellate court to indulge in speculation as to facts which, if established, would defeat the class suit theory upon which an action is brought. *Railway Express Agency, Inc., v. Jones*, 7Cir., 106 F. 2d 341, 343. A suit cannot properly be dismissed as not involving a controversy within the jurisdiction of the court unless the facts of record create a legal certainty of that conclusion. *Barry v. Edmunds*, 116 U. S. 550, 559, 6 S. Ct. 501, 29 L. Ed. 729; *Deputron v. Young*, 134 U. S. 241, 252, 10 S. Ct. 539, 33 L. Ed. 923. . . .”

B. A TRIAL IS NECESSARY.

The United States Supreme Court, in

Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91
L. Ed. 2030 (1947),

said:

“ . . . Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies. . . .”

“It is obvious that there is more to this litigation than meets the eye on the pleadings. . . .”

The Supreme Court has already decided adversely to appellants' contentions that the fraudulent acts of public officials are not reviewable by the courts.

CONCLUSION.

The Court has found in numerous now final judgments that it has jurisdiction “of the subject matter and persons involved.”

The Court has found that the litigation is being prosecuted in good faith and on reasonable grounds.

The Court has found that the Los Angeles Bank was seized and denuded of all its assets.

The Court has found evidence of intimidation to prevent the obtaining of counsel.

The Court has found the appellants have used in excess of \$100,000.00 of the seized assets for payment of fees to their own attorneys.

These findings are all either final or are admitted by appellants.

Under these circumstances, the Court below, after four years of litigation, has allowed \$75,000.00, as an interim

allowance for attorney fees to permit a trial on the merits.

The question to be decided by this Court of Appeals on this appeal is whether or not such a trial on the merits shall be had as directed by the United States Supreme Court, or whether these seizures and confiscations on the flimsy pretexts of "economy and efficiency" shall be permitted to go forever unquestioned and untried.

If appellants succeed in preventing this allowance of attorneys' fees, their summary confiscation, without notice, hearing or trial, in defiance of every concept of fair play and due process, will have achieved at least a part of their intent.

They will, by the very success of their arbitrary action, have cut off or crippled the power to question the validity of what they did.

A trial is necessary.

A denial of counsel is a denial of due process.

The order allowing from funds in court, as interim attorneys' fees to appellees, 1/7th of 1% of appellees own seized assets to enable them to obtain a trial on the merits of the seizure and confiscation of their solvent bank and its \$46,000,000.00 of assets, should be affirmed.

"The Labourer Is Worthy of His Reward." (I Timothy 5-18; Luke X-7.)

Respectfully submitted,

CHARLES K. CHAPMAN,

*Attorney for Appellee, Long Beach Federal Savings
and Loan Association.*

WYCKOFF WESTOVER,

*Attorney for Appellee, Shareholders' Protective Com-
mittee.*

Exhibit A.

In the District Court of the United States, in and for the Southern District of California, Central Division.

Mallonee, *et al.*, Plaintiffs, vs. Fahey, *et al.*, Defendants.

Federal Home Loan Bank of Los Angeles, *et al.*, Plaintiffs, vs. Federal Home Loan Bank of Portland, also sometimes known and referred to as the Federal Home Loan Bank of San Francisco, *et al.*, Defendants.

Civil Action No. 5421-P.H. (and consolidated, related and enjoined actions No. 5678-P.H., in said Southern District, No. 7989-W.M., in said Southern District, No. 28203-G in the Northern District, and No. 14492 in the Superior Court of California).

ORDER.

An application was made *ex parte* for a stay of the Order this day signed, directing the payment of the sum of \$67,500.00 to O'Melveny and Myers and Richard FitzPatrick, as and for attorneys' fees on account for services heretofore rendered in the within consolidated actions, and the sum of \$7,500.00 to W. I. Gilbert, Jr., as and for attorneys' fees on account for services heretofore rendered in the within consolidated actions, and there was present the following counsel: Philip H. Angell and Irving G. Bishop, Paul Fitting, Assistant United States Attorney, Charles K. Chapman, Wyckoff Westover, W. I. Gilbert, Jr., Pierce Works, of O'Melveny and Myers, all appearing for the various parties for whom appearances have heretofore been made by said respective counsel.

The within litigation has been pending since May 27th, 1946; it is of an extremely complex nature; all parties to the within proceeding on the allowances of attorneys fees

have proceeded with diligence and good faith to bring the multiple claims among the numerous parties in the actions in chief to issue; at least since May 10, 1949, if not from the inception of the litigation, all parties have proceeded on the basis that no fees would be collected by counsel in whose favor the above order runs except upon court order, after adversary proceedings; the matter of the entire litigation is proceeding in one phase or another almost daily and requires the constant attention of counsel; the objections to the payment of the fees directed to be paid by the above order, were based entirely on matters of law which have heretofore been repeatedly urged upon and repeatedly rejected by this court and have been set forth in various findings, orders and judgments; reference to which is hereby made, from which judgments and orders either no appeal was taken, or the time for appeal has long since expired, or in some instances appeals were taken and later dismissed.

In view of the foregoing it appears that it would be an abuse of discretion and a denial of the right to counsel, to grant a stay of the above order, and the same is denied, except as follows:

It Is Hereby Ordered, that a stay is hereby granted until 5:00 o'clock P.M., June 29, 1950, on said Order, directing the payment of attorneys' fees on account, on condition that on or before said date and hour, any party desiring to appeal shall have filed notice of appeal, and shall also on or before said date and hour have filed application on notice to all counsel hereinbefore named, for stay of said Order with the United States Court of Appeals for the Ninth Circuit.

If such notice of appeal is not filed on or before said date and hour, and if such application for stay is not made

on or before said date and hour, then and in that event the within stay shall expire at 5:00 o'clock P. M. on June 29, 1950, and the Clerk of this Court is hereby directed to forthwith pay the above sums in accordance with the terms of said order.

In the event such notice of appeal and such application for a stay shall have been filed on or before said date and hour, then and in that event a stay is granted as to the payment of the monies provided by said order until the first occurring of either of the following events:

- (a) The granting of a stay by the United States Court of Appeals for the Ninth Circuit, pending its decision; or
- (b) The denial of such stay.

Dated this 19th day of June, 1950.

7:25 P. M.

s/ PEIRSON M. HALL

PEIRSON M. HALL, Judge.

Book 66, page 569.

Filed Jun. 19, 1950. Edmund L. Smith, Clerk. By S. W. Stacey, Deputy Clerk.

Judgment entered June 19, 1950, Book 66, page 569. Edmund L. Smith, Clerk.

Exhibit B.

United States Department of Justice
United States Attorney
Southern District of California
600 Federal Building
Los Angeles 12

April 27, 1949

Messrs. Westover & Smith,
Attorneys at Law
Suite 1007,
1015 Pacific Southwest Building,
216 West 6th Street,
Los Angeles 14, California.

Re: Paul Mallonee et al. vs. John H. Fahey, et al.
No. 5421-P.H. Civil and Consolidated Case No.
5678-P.H. Civil.

Gentlemen:

At our conference in the office of the United States Attorney yesterday, April 26th, you requested that, prior to further consideration of our proposal for settlement, I submit to you a final offer in writing stating the terms in respect to attorneys' fees, on which negotiations may proceed. After consultation with the Home Loan Bank Board, I am authorized to state that the Board is prepared in respect to matters of attorneys' fees, in addition to the proposal heretofore made, to negotiate on any one of the following bases:

(1) The attorneys' fees, whether interim or final, shall be judicially determined in an adversary proceeding and the stipulation dated March 22, 1949,

and the subsequent award of April 1, 1949, be vacated, or

(2) Following the suggestion of the court, one-third of the amount awarded by the court in its decision of April 1st shall be paid now on proper order of the court (less the deduction of \$50,000 previously paid, as provided in presently proposed order), regardless of the outcome of negotiations for settlement; the said stipulation and award shall be vacated and any further attorneys' fees shall be judicially determined in an adversary proceeding at the conclusion of negotiations for settlement, if agreement thereon be reached, or in the litigation, if such there be, or

(3) Following the suggestion of Mr. Fussell, one-third of the amount awarded by the court in its decision of April 1, 1949, to be paid now as an interim allowance on account by order of the court (less the deduction of \$50,000 previously paid as provided in presently proposed order) regardless of the outcome of any further negotiations for settlement; the said stipulation and award shall be vacated and any further attorneys' fees shall be determined by the court on such showing as the court may require, subject to agreement of the parties as to the maximum amount thereof at the conclusion of negotiations for settlement, if agreement thereon be reached. If no settlement be reached, any additional fees shall be judicially determined in said litigation.

The other terms of our letter of April 16, 1949, remain unchanged, except that the provisions of numerical paragraph 4 is open to further consideration in accordance with our prior conversation.

It is requested that you indicate your position on these suggestions by 12:00 noon, Monday, May 1, 1949.

Your proposal for an alternative to a dismissal with prejudice should be delivered to us by the same date and hour.

There is no occasion to indicate any specific amount of attorneys' fees until you have stated which of the above propositions is acceptable to you.

Yours very truly,

/s/ PEYTON FORD,

The Assistant to the
Attorney General.

P. S.: The time is set for Monday because of the shortness of time involved.

/s/ P. F.

No. 12592

United States
Court of Appeals
For the Ninth Circuit.

LAWRENCE A. WHITE and ERMA R. WHITE,
Appellants,
vs.
CLARA M. EAGLESON,
Appellee.

Transcript of Record

Appeals from the District Court,
for the Territory of Alaska
Third Division

FILED

JAN 11 1951

PAUL P. O'BRIEN,
CLERK

No. 12592

United States
Court of Appeals
For the Ninth Circuit.

LAWRENCE A. WHITE and ERMA R. WHITE,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Certificate of Clerk to Record on.....	226
Designation of Contents of Record on.....	49
Notice of.....	45, 48
Order Re Extension of Time to File and Docket Record on.....	51
Stipulation Re Extension of Time to File and Docket Record on.....	50
Certificate of Clerk to Record on Appeal.....	226
Complaint	3
Exhibit A—Authorization to Sell.....	5
Court's Instructions to the Jury.....	28
Designation of Contents of Record on Appeal..	49
Exhibits, Plaintiff's:	
No. 1—Authorization to Sell.....	66
2—Agreement of Sale.....	113
Judgment	40
Memorandum Opinion on Defendants' Motions for Judgment and for New Trial.....	47

INDEX	PAGE
Minute Order Entered March 29, 1950—Transferring Cause.....	46
Motion for New Trial.....	43
Motion to Set Aside Verdict and for Entry of Judgment in Favor of the Defendants.....	42
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	45, 48
Order Re Extension of Time to File and Docket Record on Appeal.....	51
Plaintiff's Requested Instructions.....	19
Proceedings	54
Requested Instructions on Behalf of the Defendants	22
Separate Answer of Lawrence A. White.....	7
Separate Answer of Erma R. White.....	10
Stipulation Concerning Printing of Record....	228
Stipulation Re Extension of Time to File and Docket Record on Appeal.....	50
Trial by Jury February 20, 1950.....	13
Trial by Jury February 21, 1950.....	16
Trial by Jury February 23, 1950.....	18
Trial by Jury February 24, 1950.....	38
Verdict No. 1.....	39

INDEX

PAGE

Witnesses, Defendants':

Pickering, Herbert E.

—direct 167

—cross 173

—redirect 177

White, Lawrence A.

—direct 181

—cross 185

—redirect 201

Witnesses, Plaintiff's:

Dayton, Wendell

—direct 98

—cross 100

—redirect 101, 105

—recross 102, 107

Eagleson, Clara M.

—direct 133

—cross 146

Easley, Oliver J.

—direct 122

—cross 125

Johnston, Rodney L.

—direct 109

	INDEX	PAGE
Witnesses Plaintiffs—(Continued):		
Rentschler, Carl T.		
—direct		63
—cross		75, 79
—redirect		97
White, Lawrence A.		
—direct		58

NAMES AND ADDRESSES OF ATTORNEYS

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CUDDY & KAY,

Attorneys at Law,

Anchorage, Alaska,

For the Plaintiff.

WILLIAM W. RENFREW,

DAVIS & RENFREW,

Attorneys at Law,

Anchorage, Alaska,

For the Defendants.

In the United States District Court for the
Territory of Alaska, Third Judicial Division

No. A-5495

CLARA M. EAGLESON,

Plaintiff,

vs.

LAWRENCE A. WHITE and ERMA R. WHITE,
Defendants.

COMPLAINT

The plaintiff complains of the defendants, and for
cause of action, alleges:

I.

That at all times herein mentioned plaintiff was,
and now is, a duly licensed real estate broker and
engaged in business in the City of Anchorage, Third
Judicial Division, Territory of Alaska.

II.

That on the 7th day of July, 1948, plaintiff was
employed by the defendants to procure a purchaser
of a certain going business known as "L W Choco-
late Shop" at 744 Fourth Avenue, in the City of
Anchorage, Alaska; that thereafter the said agree-
ment of employment was extended until the 30th
day of April, 1949; that a copy of said authorization
to sell is attached hereto marked Exhibit "A" and
made a part hereof by reference.

III.

That in consideration thereof, the defendants

promised and agreed to pay to plaintiff for her services a commission of ten per cent (10%) upon the selling price thereof.

IV.

That thereafter, and during the month of April, 1949, the plaintiff was instrumental in obtaining one John Doe Pinkering to purchase said property, and the plaintiff is informed and believes, and upon the basis of such information and belief, alleges it to be a fact, that on a certain day in the month of April, 1949, the exact date being unknown, said property was duly sold by the defendants to the said John Doe Pinkering for the sum of Thirty-five Thousand and no/100 (\$35,000.00) Dollars.

V.

That the agreed commission amounting to Three Thousand Five Hundred and no/100 (\$3,500.00) Dollars by reason of the premises became due and payable by the defendants to the plaintiff on the date of said sale, but that the same has not been paid nor any part thereof.

Wherefore, plaintiff prays for judgment against the defendants in the sum of Three Thousand Five Hundred and no/100 (\$3,500.00) Dollars, for a reasonable attorney's fee, and for costs of suit.

/s/ CLARA M. EAGLESON.

United States of America,
Territory of Alaska—ss.

Clara M. Eagleson, being first duly sworn on oath,
deposes and says:

That she is the plaintiff in the foregoing Com-
plaint; that she has read the same, knows the con-
tents thereof and believes the same to be true.

/s/ CLARA M. EAGLESON.

Subscribed and Sworn to before me this 6th day
of May, 1949.

[Seal] /s/ WENDELL P. KAY,
Notary Public in and for
Alaska.

My commission expires: 1-25-52.

Exhibit "A"

Authorization to Sell

Seattle & I
Radio

(Confidential
Listing)

I, Lawrence A. White and Erma R. White of
Anchorage, Territory of Alaska, have this day given
Clara M. Eagleson, Licensed Real Estate Broker,
in and for the Territory of Alaska, the exclusive sale
or transfer of real estate situated at: Anchorage,
Alaska.

To wit: Lin Chocolate Shop with installed
equipment less inventory (\$5000) doing business
under name of above and consisting of combined
candy making and retail and restaurant at 744 4th

Ave. Lease \$450/mo. rent until Nov. 1951—option 1 yr.

Property of and of record in the name of above.

I hereby appoint and constitute Clara M. Eagleson as my lawful agent and authorize said agent to enter into written agreement for me and on my behalf and in my name, for the sale of said real estate for the agreed price of \$45,000.

I agree to make a satisfactory deed and to give clear abstract of title, if so required, showing the title to be fully vested in me.

In consideration of the services of said agent in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner, whatever, in selling or transferring said property, I agree to pay said agent out of first payment a commission due on total sale price of 10% of \$45,000 payable at the office of the said agent. Any change in the price or terms agreed to by me, or in case a sale is made by owner while this agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property. Should a deposit secured by said agent be forfeited, one-half hereof may be retained by said agent and the balance shall be paid to me. The agent's share of any forfeited deposit, however, shall not exceed my commission.

I hereby list said property exclusively with said agent for a period of 60 days. I agree to pay said agent the commission set forth in this agreement, if a sale is made within 60 days after the termination of this Authorization to Sell, to parties with whom

said agent negotiated during the time of the Authorization to Sell.

Authorziation to Sell made in duplicate. Seller hereby acknowledges receipt of a copy of this agreement.

Dated: July 7, 1948, Anchorage, Alaska.

Period Mar. 1, 1947—Feb. 28, 1948.

Gross Receipts—\$118,224.84

Net Income—\$22,517.44

8 employees

Care

/s/ LAURENCE A. WHITE,
ERMA R. WHITE.

Extension until 4/30/49

Law

22

3-23

[Endorsed]: Filed May 6, 1949.

[Title of District Court and Cause.]

SEPARATE ANSWER OF
LAWRENCE A. WHITE

Comes now Lawrence A. White, one of the above-named defendants, and answering for himself but not for his co-defendant, admits denies and alleges as follows:

I.

Defendant admits the allegations of Paragraph I of plaintiff's complaint.

II.

Defendant admits the allegations of Paragraph II of plaintiff's complaint, except that defendant alleges that the agreement was not extended for or on behalf of the defendant, Erma R. White.

III.

Defendant admits the allegations of Paragraph III of plaintiff's complaint.

IV.

Defendant denies each and all the allegations of Paragraph IV of plaintiff's complaint.

V.

Defendant denies each and all the allegations of Paragraph V of plaintiff's complaint, save and except the allegation that no money has been paid to the plaintiff by the defendant, and that allegation is admitted, and in that connection defendant Lawrence A. White, alleges that the agreement between plaintiff and defendants had expired by its terms prior to the time any sale of the premises was had and prior to the time that any agreement for sale of the premises was made, and that plaintiff was not instrumental in any manner in interesting the buyer in purchasing the property and such purchase was consummated by direct negotiations between the sellers and the buyer after the expiration of the agreement mentioned in plaintiff's complaint, and without any effort on behalf of the plaintiff therein, and as defendant believes, plaintiff is not entitled to any commission on account of such sale.

Wherefore, having fully answered plaintiff's complain, defendant, Lawrence A. White, prays that plaintiff take nothing thereby and that defendant may have and recover of and from the plaintiff defendant's costs and disbursements in this action incurred, including a reasonable attorney's fee to be set by the Court.

DAVIS & RENFREW,
Attorneys for Defendant,
Lawrence A. White,

By /s/ EDWARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

Edward V. Davis, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, Lawrence A. White, in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true; that defendant, Lawrence A. White, is absent from the City of Anchorage, the place where this verification is made, and that therefore your affiant makes this affidavit.

/s/ EDWARD V. DAVIS.

Subscribed and sworn to before me this 13th day of June, 1949.

[Seal] /s/ MILDRED MORIARTY,
Notary Public for Alaska.

My Com. expires: 12-20-50.

Receipt of copy acknowledged.

[Endorsed]: Filed June 16, 1949.

[Title of District Court and Cause.]

SEPARATE ANSWER OF ERMA R. WHITE

Comes now Erma R. White, one of the above-named defendants, and answering for herself but not for her co-defendant, admits, denies and alleges as follows:

I.

Defendant admits the allegations of Paragraph I of plaintiff's complaint.

II.

Defendant admits the allegations of Paragraph II of plaintiff's complaint, except that defendant alleges that the agreement was not extended for and on behalf of the defendant, Erma R. White, and said agreement expired by its terms as to such defendant on or about the 7th day of September, 1948.

III.

Defendant admits the allegations of Paragraph III of plaintiff's complaint.

IV.

Defendant denies each and all the allegations of Paragraph IV of plaintiff's complaint.

V.

Defendant denies each and all the allegations of Paragraph V of plaintiff's complaint, save and except the allegation that no money has been paid to the plaintiff by the defendant, and that allegation is admitted, and in that connection defendant, Erma R. White, alleges that the agreement between plaintiff and defendants had expired by its terms prior to the time any sale of the premises was had and prior to the time that any agreement for sale of the premises was made, and that plaintiff was not instrumental in any manner in interesting the buyer in purchasing the property and such purchase was consummated by direct negotiations between the sellers and the buyer after the expiration of the agreement mentioned in plaintiff's complaint, and without any effort on behalf of the plaintiff therein, and as defendant believes, plaintiff is not entitled to any commission on account of such sale.

Wherefore, having fully answered plaintiff's complaint, defendant, Erma R. White, prays that plaintiff take nothing thereby and that defendant may have and recover of and from the plaintiff defendant's costs and disbursements in this action incurred,

including a reasonable attorney's fee to be set by the Court.

DAVIS & RENFREW,
Attorneys for Defendant,
Erma R. White,

By /s/ EDWARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

Edward V. Davis, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, Erma R. White, in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true; that defendant Erma R. White, is absent from the City of Anchorage, the place where this verification is made, and that therefore your affiant makes this affidavit.

/s/ EDWARD V. DAVIS.

Subscribed and sworn to before me this 13th day of June, 1949.

[Seal] /s/ MILDRED MORIARTY,
Notary Public for Alaska.

My Com. expires: 12-20-50.

Receipt of copy acknowledged.

[Endorsed]: Filed June 16, 1949.

TRIAL BY JURY, FEBRUARY 20, 1950

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Opening statement to the Jury was had by Wendell P. Kay, for and in behalf of the Plaintiff.

Opening statement to the Jury was had by William W. Renfrew, for and in behalf of the Defendant.

Lawrence White, being first duly sworn, testified for and in behalf of the Plaintiff.

William W. Renfrew, of counsel for defendants, moves Court that jury be excused pending arguments on points of law; Jury excused.

William W. Renfrew, of counsel for defendants, moves Court for summary of judgment.

Argument to the Court was had by William W. Renfrew for and in behalf of the Defendants.

Motion denied.

Jury recalled.

Carl T. Rentschler, being first duly sworn, testified for and in behalf of the Plaintiff.

An authorization to sell dated 7/7/48 signed by Lawrence A. White and Erma R. White, was duly offered, marked and admitted as Plaintiff's exhibit 1.

At 11:50 o'clock a.m. Court duly admonished Trial Jury and continued cause until 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Carl T. Rentschler, heretofore sworn, resumed stand for further cross-examination for and in behalf of the defendants.

Wendell Dayton, being first duly sworn, testified for and in behalf of the Plaintiff.

At 2:50 o'clock p.m. Court duly admonished Trial Jury and continued cause until 3:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Rodney L. Johnston, being first duly sworn, testified for and in behalf of the Plaintiff.

Copy of agreement af sale dated 5/1/49, between Lawrence A. and Erma R. White and Herbert E. Pickering, was duly offered, marked and admitted as Plaintiff's exhibit 2.

Oliver J. Easley, being first duly sworn, testified for and in behalf of the Plaintiff.

Clara M. Eagleson, being first duly sworn, testified for and in her own behalf.

At 3:55 o'clock p.m. Court duly admonished Trial

Jury and continued cause until 4:05 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Clara M. Eagleson, heretofore duly sworn, resumed witness stand for further cross-examination for and in behalf of the Defendants.

Wendell P. Kay, counsel for Plaintiff, moves Court for leave to amend complaint by interlineation by striking word "March" in Line 1, paragraph 4, and substituting the word "April," Motion granted and Clerk is directed to make the amendment.

Wendell P. Kay, counsel for Plaintiff, moved Court for leave to amend complaint by interlineation

by substituting figure "35" for words "forty-five" in lines 6 & 7 in paragraph IV; the same substitution in Line 2 of paragraph V; by striking words "four" and substituting word "three" in line 6, paragraph V; and striking figure "4" and substituting figure "3" in line 6, paragraph V; motion granted.

Plaintiff rests.

William W. Renfrew, of counsel for Defendants, moves Court for directed verdict in favor of Defendants; Motion denied.

Herbert E. Pickering, being first duly sworn, testified for and in behalf of the Defendants.

At 5:00 o'clock p.m. Court duly admonished Trial Jury and continued cause until 10:00 o'clock a.m. of Tuesday, February 21, 1950.

Entered Feb. 20, 1950.

TRIAL BY JURY, FEBRUARY 21, 1950

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Lawrence White, heretofore duly sworn, resumed witness stand for further testimony for and in behalf of the defendants.

Defendants rest.

At 10:45 o'clock a.m. Court duly admonished Trial Jury and continued cause until 10:55 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

William W. Renfrew, of counsel for defendants, moves Court jury be excused pending arguments on points of law; jury excused.

William W. Renfrew, of counsel for defendants, moves for directed verdict for defendants on grounds Plaintiff has refused and failed to prove her case.

Argument to the Court was had by William Renfrew, for and in behalf of the Defendants.

Motion denied; Jury recalled.

At 11:15 o'clock a.m. Court duly admonished Trial Jury and continued cause until 2:00 p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Opening argument to the Jury was had by Wendell P. Kay, for and in behalf of the Plaintiff.

Argument to the Jury was had by William W. Renfrew, for and in behalf of the Defendant.

At 4:05 o'clock p.m. Court duly admonished Trial Jury and continued cause until 4:15 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Closing argument to the Jury was had by Wendell P. Kay, for and in behalf of the Plaintiff.

At 4:35 o'clock p.m. Court duly admonished Trial Jury and continued cause until 9:30 o'clock a.m. of Thursday, February 23, 1950.

Entered Feb. 21, 1950.

TRIAL BY JURY, FEBRUARY 23, 1950

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. White and Erma R. White, Defendants, was resumed.

Whereupon the Court reads his instructions to the Trial Jury and John Mack and Don Carlquist were duly sworn by the Deputy Clerk as bailiffs in charge of said Jurors, and upon stipulation by and between respective counsel the Court directed that a sealed verdict be returned in this cause and at 10:04 o'clock a.m. the Trial Jury retired in charge of their sworn bailiffs.

Entered Feb. 23, 1950.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

I.

The contract which has been offered in evidence as Plaintiff's Exhibit No. 1 gave the plaintiff the exclusive right to sell the property during the life of the contract, or any valid extension thereof. The contract further provided that the plaintiff would be entitled to her commission if a sale was made by the owner (the defendants here) while the agreement was in effect. The evidence is conflicting as to whether or not the owner sold the property to Pickering before the expiration of the agreement with plaintiff on April 30th. If you should find from the evidence that the defendant White had entered into a definite agreement with Pickering by which White agreed to sell the shop to Pickering and Pickering agreed to buy it, and such agreement was made prior to the termination of plaintiff's agency on April 30th, and the execution of the contract was deferred merely for the purpose of evading liability to plaintiff for a commission, then there was a sufficient sale of the property within the stipulated time to entitle the plaintiff to her commission, and you should find for her.

Mercantile Trust Co. v. Lamar (Mo. 1910),
128 S. W. 20, at p. 22.

II.

The principal or owner under a contract or agency agreement such as is concerned in the present

case owes certain obligations and duties to his agent, just as the agent does to the principal. Each owes to the other the duty of performance according to the terms of their agreement, and each is required to observe good faith in dealing with the other. (Mecham Agency Sec. 596, et seq.) In the present case, the principal White had granted to plaintiff the exclusive right to sell the property involved, and had agreed that plaintiff would receive her commission even if a sale should be made by White himself during the life of the agreement. Defendants could not evade the liability for plaintiff's commission by reaching an agreement with a buyer during the life of plaintiff's agreement, but postponing the formal consummation of the sale until the agency expired.

Therefore, if you find from the evidence that the defendant, White, had entered into a definite agreement with Pickering by which White agreed to sell the shop to Pickering, and Pickering agreed to buy it, and such agreement was made during the month of April, 1949, and prior to the termination of plaintiff's agency agreement, and further find that the formal execution of the contract was postponed until May 1st by mutual agreement of White and Pickering in order to avoid liability to plaintiff for a commission, then the defendant was not dealing with the plaintiff in good faith, and the plaintiff would be entitled to the commission called for by the contract, and you should find for her.

Mercantile Trust Co. v. Lamar (Mo. 1910),
128 S. W. 20, at p. 22.

III.

The present contract provides that plaintiff is entitled to her commission if a sale is made during the life of the agreement, even if made by the owner without the intervention of assistance of the agent. There is a further provision of the contract providing that the owner will pay the commission agreed upon to plaintiff if a sale be made within sixty days after termination of the agreement, or any valid extension thereof, to parties with whom the agent negotiated during the life of the agreement.

In the present case there is no evidence that plaintiff or her representatives Rentschler ever dealt with the ultimate buyer, Pickering, during the life of the agreement. There is, however, testimony to the effect that the plaintiff and Rentschler, during that time, offered to assist in negotiations with Pickering, but that White specifically requested them not to do so. (White denies that he ever requested them not to deal or negotiate with Pickering.) It is for you, as judges of the facts, to say which, if any, of this testimony is credible and to be believed. You are instructed, however, that the principal has the right to control and direct the conduct of the agent with respect to matters entrusted to the agent. This right to direct and control the agent shall be exercised by the principal in good faith and in furtherance of the objectives of the agency agreement.

If you believe, therefore, from the evidence that White did request the plaintiff and Rentschler not to deal with Pickering, or forbade them to do so,

and that White made this request to evade any continuing liability to plaintiff for a commission under the provision of the agreement referred to above, and you further believe that plaintiff was ready and willing to negotiate with Pickering and would have done so but for White's request, then the plaintiff would be entitled to the same protection from the agreement as though she had in fact negotiated with Pickering, and you should find for the plaintiff.

Restatement, Agency, Sec. 14.

/s/ WENDELL P. KAY, of
CUDDY & KAY.

[Endorsed]: Filed February 23, 1950.

[Title of District Court and Cause.]

REQUESTED INSTRUCTIONS ON BEHALF
OF THE DEFENDANTS

I.

You are instructed that under the terms of the agreement executed between the parties, such agreement was merely an authorization to sell by the agent, and unless you find that the plaintiff, Clara M. Eagleson, was the procuring cause of the sale, the plaintiff Clara M. Eagleson is not entitled to recover from the defendants, and the verdict should be for the defendants in this matter.

II.

You are instructed that the phrase “procuring cause of the sale” as used in these instructions, means that the broker must have first called the purchaser’s attention to the property, and must have started negotiations which culminated in the sale thereof. If you find that the defendant Lawrence A. White first called the purchaser’s attention to the property, and started the negotiations which culminated in the sale, then you will find that the plaintiff was not the procuring cause of the sale, and plaintiff is not entitled to recover against the defendants or either of them.

III.

You are instructed that where an owner of property does nothing more than list his property with the broker for sale on commission at a stated price, the broker is entitled to his commission only when he is the procuring cause of the sale, and such listing does not prevent the owner from selling the property to a purchaser of his own procuring, or render the owner liable to the listing broker for a commission if the owner does so sell.

IV.

You are instructed that where an owner has given a broker an exclusive agency or right of sale to extend over a specific period of time, the owner may make a sale within that time without rendering himself liable to the broker for commissions, provided that the broker has not at the time of such

sale procured a person who is ready, able and willing to purchase the property on the terms set forth in the authorization to sell.

V.

You are instructed that to entitle a broker to receive a commission, he must accomplish what he undertook to do in his contract of employment, which in this case is the authorization to sell. Nothing short of that is sufficient to constitute a performance on the part of the broker, and a broker is not entitled to any compensation for unsuccessful efforts. As applied to the facts of this case, unless you find that Clara M. Eagleson was instrumental in selling the property to Herbert E. Pickering, you must find for the defendants.

VI.

If you find from the evidence in this cause that the defendants themselves sold the property to the purchaser at a price below the price mentioned in the authorization to sell, by reason of the fact that the purchaser refused to deal through a real estate broker, or otherwise, without the broker having been the procuring cause of the sale, then you must find for the defendants.

VII.

You are instructed that generally a listing of property for sale exclusively with one broker does not prevent the owner from selling the property himself without becoming liable to the broker for the payment of the commission. As applied to the

contract here in question, such contract purports to list the property exclusively with the agent or broker for a period of sixty days only. Such contract likewise sets forth that in case that sale is made by the owner while the agreement is in effect, that such sale shall not work a forfeiture of the commission. However, all parts of the agreement must be construed together, and the Court instructs you that as a matter of law, no consideration was given in the agreement for any promise on the part of the owners not to sell the property themselves, and no consideration was given which would support any promise by the owners to pay a commission to the broker on a sale made by the owners themselves where the broker did not interest the party purchasing the property. As applied to the facts of this case, if you should find that the defendants Lawrence A. White and Erma R. White sold the property in question to Herbert E. Pickering, the buyer, without the aid or intervention of the broker, Clara M. Eagleson, and without the plaintiff Clara M. Eagleson having interested the buyer in the property, then you must find for the defendants and against the plaintiff.

VIII.

You are instructed that the authorization to sell introduced into evidence in this case lists the property exclusively with the agent for the period of sixty days from July 7, 1948, and that the exclusive feature of such authorization expired on the 7th day of September, 1948. If you should find that after

the expiration of such exclusive feature of the authorization to sell that an attempt was made to extend the agreement until April 30, 1949, such extension would not be binding upon either of the defendants unless some consideration was given by the agent to the owners for such extension. The plaintiff is not entitled to rely on advertising done before the extension, or upon attempts to interest prospective buyers prior to the date of the extension as consideration for the extension.

IX.

You are instructed that according to the undisputed evidence, the property in question belonged to Lawrence A. White and Erma R. White as co-owners. It appears that both of such parties signed the original listing dated July 7, 1948. It does not appear that Erma R. White signed the extension of the agreement later granted by the defendant Lawrence A. White. Unless you find that Erma R. White expressly or by implication authorized the extension of the agreement, then you must find for the defendant Erma R. White in this action.

X.

You are instructed that if you should find the defendant Erma R. White is not liable to the plaintiff, but that the defendant Lawrence A. White is liable to the plaintiff, plaintiff's recovery could not in any event exceed 10% of the sale price of the interest of the defendant Lawrence A. White in the property.

XI.

You are instructed that under the undisputed evidence, the agreement executed between the parties was drawn up by the plaintiff, or her agent, and if you should find that such agreement is ambiguous in that some portions of such agreement conflict with other portions thereof, then you must construe such agreement against the plaintiff, and any doubt as to the plaintiff's powers or as to her right to recover under such agreement should be resolved against her.

XII.

You are instructed that if you find that during the period of time the authorization to sell was in effect between the plaintiff and the defendants, or either of them, that the defendant Lawrence A. White discussed with Herbert E. Pickering a sale of the business to Herbert E. Pickering, and that from these discussions a tentative agreement was reached, which agreement was contingent on the failure of the plaintiff to secure a buyer within the period of her authorization to sell, and that even though papers expressing the tentative agreement between the defendants and Herbert E. Pickering were drawn, but that such tentative agreement was not finally entered into between the sellers and the buyer, and was not executed until after the contingency named had happened, that is to say, until after final expiration of plaintiff's authorization to sell, then the plaintiff can recover nothing from the

defendants under her complaint, and you must find for the defendants.

[Endorsed]: Filed February 23, 1950.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

We have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

When you were accepted as jurors in this case you obligated yourselves by your oaths to well and truly try the matter in issue between the plaintiff and the defendants, and a true verdict render according to the law and the evidence as given to you on the trial. That oath means that you will not be swayed by passion, sympathy or prejudice, and that your verdict will be the result of a careful consideration of all the evidence and the instructions of the Court as to the law.

Neither the statements of counsel engaged in the trial of this case, nor the allegations of the pleadings, except so far as they constitute admissions, are to be considered by you as proof of the facts to which they relate. You should not regard or consider the relative financial condition of the parties to the suit, nor the effect of your verdict upon the parties, or

any of them, or attempt to arrive at a verdict based upon your individual or collective opinions as to the abstract principles of justice which should govern the case.

It is not for you to say what the law is or should be regardless of any idea you may have in that respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

No. 2

By this action plaintiff seeks to recover damages in the sum of \$3500 for an alleged breach of contract as a real estate broker. She alleges in her complaint that on July 7, 1948, she was employed by the defendants to sell the L. W. Chocolate Shop in Anchorage for \$45,000 upon which her commission would be 10%; that subsequently the contract was extended to April 30, 1949, and that in April, the plaintiff was instrumental in obtaining a purchaser to whom the defendants, in April, the exact date being unknown to plaintiff, sold the property listed with her for \$35,000.

The defendants deny that plaintiff was instru-

mental in procuring a purchaser and allege that the sale was negotiated by them after the contract with plaintiff had expired, and that the contract was not extended by the defendant Erma R. White.

The burden of proving by a preponderance of the evidence that plaintiff was instrumental in promoting purchase by Pickering is upon the plaintiff.

The principal question for your determination is whether the property was sold during the life of the contract or any valid extension thereof.

No. 3

Under the contract between the parties, plaintiff's Exhibit No. 1, the plaintiff was given the exclusive right to sell the property described in the complaint for 60 days and, if the extension was valid, for the further period ending April 30, 1949, with the right to receive the commission agreed upon if the defendants sold the property during the life of the contract, or if they sold the property within 60 days after April 30, 1949, to any person with whom the plaintiff had negotiated prior to April 30, 1949.

Defendants contend that the extension referred to was not authorized or ratified by the defendant Erma R. White and that consequently neither she nor the partnership is bound by such extension.

You are instructed that authorization or ratification by a partner may be shown by direct evidence, as by acts or written or spoken words, or it may be inferred from the surrounding facts and circumstances. It is for you to say whether there are any facts or circumstances from which authorization or

ratification by the defendant Erma R. White may be inferred. In determining this question you may take into consideration the fact that the contract with plaintiff, Exhibit No. 1, was executed by both defendants, the relations between them in the conduct of their business, the fact that the property in question was sold by them shortly thereafter, and all the other facts and circumstances.

However, before you would be warranted in inferring ratification on the part of the defendant Erma R. White, it would have to appear by a preponderance of the evidence that she knew of the extension and had an opportunity to repudiate it, and that the situation was such that she was obliged to speak if she did not consent rather than remain silent.

If you find that the defendant Erma R. White did not authorize or ratify the extension referred to, then neither she nor the partnership would be liable, but the defendant Lawrence A. White would be personally liable to the same extent as the partnership would be if the extension had been granted by both partners.

No. 4

It is contended by the plaintiff that the property was actually sold before April 30th to Pickering, but that the transaction was given the appearance of a sale after that date and, moreover, that she was dissuaded from negotiating with Pickering and that these acts were done by the defendants for the purpose of defrauding her of the commission.

Defendants contend that it was a bona fide sale

which was not consummated until after April 30th, that their dealings with Pickering were open and aboveboard, and that so far as dissuading her is concerned, all they did was to lay before her the facts about Pickering.

You are instructed that the law requires the utmost good faith on the part of the principal toward his agent. Each owes to the other the duty of performance according to the terms of their agreement.

In this connection, you are instructed that if you find from a preponderance of the evidence that at any time before April 30, 1949, Pickering agreed to buy and the defendants agreed to sell the property in question, and find that such agreement was unconditional and not contingent on the sale of the property by the plaintiff in the meantime, and further find that the formal execution of the sales contract, Plaintiff's Exhibit No. 2, was deferred to May 1, 1949, for the purpose of defrauding the plaintiff of her commission, you should find for the plaintiff in the sum of \$3500. On the other hand, if you do not so find, your verdict should be for the defendants.

You are also instructed that if you find that the plaintiff would have negotiated with said Pickering but for the acts or conduct, if any, of defendant, Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date.

No. 5

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, and under that rule he is required to prove such issue by a preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue, you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it.

No. 6

Subject to the laws contained in these instructions, you are also the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence, except such evidence as is declared by the Court to be conclusive.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and

in subordination to the rules of evidence; that the oral admissions of a party should be viewed with caution; that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

Before reaching a verdict you will carefully consider and compare all the testimony. In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same way as you would decide whether to believe something told you out of court. You size up the witness in court in the same way as an informant out of court, observe his appearance and demeanor, note his intelligence, whether he is candid and fair, whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to observe or learn or remember the truth, the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, and the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on the witness' credibility and the weight of his testimony. When a witness has a strong personal interest in the outcome of a case, the

temptation to lie, or to color, distort or withhold the truth may likewise be strong. Notwithstanding that, however, you may find that he has told the truth. What has just been said concerning interest in the outcome of a case is likewise applicable to bias or prejudice against or a disposition to favor, either party. In other words, you should bring to bear upon your consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which you, as reasonable human being, have and exercise in every day affairs of life. Accordingly, you should draw from the evidence in this case all deductions which appear to you to flow logically from such evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case. A witness wilfully false in one part of his testimony may be distrusted in other parts. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are also instructed that the opening state-

ments and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal to your reason and judgment, and are not in conflict with the law as set forth in these instructions.

No. 7

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and you should not single out one particular instruction and consider it by itself or separately from or to the exclusion of all the other instructions.

As you have been heretofore instructed, your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

No. 8

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conviction,

founded upon the law and the evidence of the case, merely to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.

Accordingly, no juror should hesitate to change the opinion he has entertained, or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

No. 9

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room the exhibits and these instructions, together with three forms of verdict.

If you agree upon a verdict during business hours, that is, between 9 a.m. and 5 p.m., you may have your foreman date and sign it and then return it into open court in the presence of the entire jury, together with these instructions and the unused forms of verdict. If, however, you agree upon a verdict after business hours, that is, after 5 p.m. one day and before 9 a.m. the following day, you should similarly have your foreman date and

sign it and seal it in the envelope accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the court next convenes at 10 a.m. when the verdict will be received from you in the usual way.

Given at Anchorage, Alaska, this 23rd day of February, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed February 23, 1950.

TRIAL BY JURY, FEBRUARY 24, 1950

Now at 10:00 o'clock a.m. came the Jury, in charge of their sworn bailiffs who, on being called, each answered to his or her name, came also the respective counsel and said Jury did present, by and through their Foreman, in open Court, their verdict in cause No. A-5495, entitled Clara M. Eagleson, Plaintiff versus Lawrence A. White, and Erma P. White, Defendants which is in words and figures as follows, to wit:

Which verdict the Court ordered filed and discharged the Jury to report at 10:00 o'clock a.m. of Monday, February 27, 1950.

Entered Feb. 24, 1950.

In the District Court for the Territory of Alaska,
Division Number Three at Anchorage

No. A-5495

CLARA M. EAGLESON,

Plaintiff,

vs.

LAWRENCE A. WHITE, and ERMA R. WHITE,
Defendants.

VERDICT No. I.

We, the jury, duly impanelled and sworn to try
the above-entitled cause, find for the plaintiff and
against the defendants in the sum of \$3,500.00.

Dated at Anchorage, Alaska, this 23rd day of
February, 1950.

/s/ WARDIE W. KING,
Foreman.

Entered February 24, 1950.

In the District Court for the Territory of Alaska,
Third Division

No. A-5495

CLARA M. EAGLESON,

Plaintiff,

vs.

LAWRENCE A. WHITE, and ERMA R. WHITE.
Defendants.

JUDGMENT

The above-entitled action came on regularly for trial, commencing the 20th day of February, 1950, before the above-entitled Court at Anchorage, Alaska, the plaintiff being represented by Cuddy & Kay, her attorneys, and the plaintiff, Clara M. Eagleson, being present in person, and the defendant Lawrence A White being present in Court and the defendant Erma R. White not being present in Court, but both defendants being represented by Davis and Renfrew, their attorneys, a jury of twelve persons was regularly impanelled and sworn to try the cause and testimony, both oral and documentary, having been introduced and submitted on behalf of the plaintiff and defendants, whereupon the Court instructed the jury upon the law in the matter, and Counsel for both sides having argued the matter to the jury and the jury retired to consider their verdict, and upon stipulation of Counsel for both parties at the time the jury retired, the jury was directed to bring in a sealed verdict. Thereupon and at 10:00 a.m. on the 24th day of

February, 1950, the jury returned into Court and returned their sealed verdict, which upon being unsealed in open Court and in the presence of the jury was found to be a verdict in favor of the plaintiff, reading as follows: "Verdict No. I. We, the jury, duly impanelled and sworn to try the above-entitled cause, find for the plaintiff and against the defendants in the sum of \$3500.00. Dated at Anchorage, Alaska, this 24th day of February, 1950. Wardie W. King, Foreman."

Wherefore by virtue of the law and by reason of the premises aforesaid, it is hereby

Ordered, Adjudged and Decreed, that judgment be and is hereby given in favor of the plaintiff, Clara M. Eagleson, in the sum of Thirty-Five Hundred and No/100 (\$3500.00) Dollars plus interest in the sum of One Hundred Seventy-Five Dollars (\$175.00) and that the plaintiff shall have and recover of and from the defendant, plaintiff's costs and disbursements in the action incurred, to be taxed by the Clerk of the Court in the manner provided by law, and an attorney's fee in the sum of Five Hundred Dollars (\$500).

Dated at Anchorage, Alaska, this 27th day of February, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of Copy acknowledged.

Entered Feb. 27, 1950.

[Endorsed]: Filed Feb. 27, 1950.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND FOR
ENTRY OF JUDGMENT IN FAVOR OF
THE DEFENDANTS, LAWRENCE A.
WHITE AND ERMA R. WHITE

Come now Lawrence A. White and Erma R. White, the above-named defendants, and move that the verdict rendered by the jury in the above-entitled cause in favor of the plaintiff and against the defendants in the sum of \$3,500.00, rendered on the 24th day of February, 1950, together with the judgment entered by the Court following such verdict, may be set aside, and that judgment be entered in favor of the defendants Lawrence A. White and Erma R. White, in accordance with the motion of such defendants for directed verdict made at the close of plaintiff's case, and at the close of all of the evidence. In the alternative, defendants Lawrence A. White and Erma R. White, move for a new trial, all as will more fully appear from the motion for new trial filed herewith.

This motion is based upon the fact, that as will more fully appear from all the records and files of this action, defendants, at the close of plaintiff's evidence, and again at the close of all of the evidence, moved for the direction of a verdict in favor of the defendants, on the ground that the evidence was insufficient to justify a judgment in favor of the plaintiff and against such defendants, and in particular on the ground that the agreement on which plaintiff's action is based, should have been

construed against the plaintiff for the reason that such agreement as properly construed would not have prevented defendants from selling the property without being responsible to pay plaintiff a commission at the time the sale was made, and the Court should have instructed a verdict for the defendants on that ground.

Dated at Anchorage, Alaska, this 6th day of March, 1950.

DAVIS & RENFREW,

Attorneys for the Defendants Lawrence A. White
and Erma R. White,

By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed Mar. 6, 1950.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now Lawrence A. White and Erma R. White, the above-named defendants, and move that the verdict rendered in the above-entitled cause on the 24th day of February, 1950, together with the judgment rendered following such verdict, may be vacated and set aside, and that the defendants, Lawrence A. White and Erma R. White, may be granted a new trial in such action for the following reasons:

1. That the verdict as rendered by the jury is not supported by sufficient evidence, but is contrary to the evidence.

2. That the verdict against the defendants, Lawrence A. White and Erma R. White, as rendered, is against the law.

3. That certain errors of law occurred during the trial of the cause, which errors were objected to and excepted to by the defendants in the following particulars:

A. The Court erred in refusing to grant defendants' motion made for directed verdict made at the close of plaintiff's case and renewed at the close of all of the evidence.

B. That the Court erred in submitting the matter to the jury.

C. That the Court erred in giving the fourth and fifth paragraphs of instruction number four, for the reason that such instructions were not supported by any competent evidence, and were not justified in law in accordance with the pleadings and evidence of the case, and such instruction was excepted to by the defendants, all as will more fully appear from the exceptions taken at the close of the trial.

D. That the Court erred in refusing to instruct the jury as requested by the defendants in requested instructions numbered one through twelve, for the reason that such requested instructions were proper instructions to have been given under the pleadings of the case and in light of the evidence as given in the case.

E. That the Court erred in receiving the verdict of the jury in the above-entitled cause, for the rea-

son that such verdict is contrary to the evidence, and not supported by any substantial evidence, and for the reason that the plaintiff has wholly failed in her proof to show any liability of the defendants, Lawrence A. White and Erma R. White, to the plaintiff under the terms of the agreement which is the basis of this action.

Dated at Anchorage, Alaska, this 6th day of March, 1950.

DAVIS & RENFREW,
Attorneys for the Defendants Lawrence A. White
and Erma R. White.

By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed March 6, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Circuit Court of Appeals of the United States of America, for the Ninth Circuit:

Notice Is Hereby Given that Lawrence A. White and Erma R. White, the defendants above named, hereby appeal to the Circuit Court of Appeals of the United States of America for the Ninth Circuit, from that certain judgment entered in the above-entitled cause by the above-entitled Court on the 27th day of February, 1950, in favor of the plaintiff and against the defendants, in the amount of

Three Thousand Five Hundred Dollars (\$3500.00), together with costs and attorneys' fees.

Dated at Anchorage, Third Judicial Division, Territory of Alaska, this 28th day of March, 1950.

DAVIS & RENFREW,
Attorneys for Appellants, Lawrence A. White and
Erma R. White.

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed March 28, 1950.

MINUTE ORDER ENTERED MARCH 29, 1950
TRANSFERRING CAUSE
A-5495

Now at this time upon request of District Judge George W. Folta, of the First Division, presently presiding over the District Court for the First Ketchikan Division, at Ketchikan, Alaska.

It Is Ordered that cause No. A-5495, entitled Clara M. Eagleson, Plaintiff, versus Lawrence A. and Erma R. White, Defendants, be and is hereby transferred by registered air mail to First Ketchikan Division, Ketchikan, Alaska.

Entered Mar. 29, 1950.

[Title of District Court and Cause.]

MEMORANDUM OPINION ON DEFEND-
ANTS' MOTIONS FOR JUDGMENT AND
FOR NEW TRIAL

Filed April 4, 1950

WENDELL P. KAY,
Attorney for Plaintiff.

DAVIS & RENFREW,
Attorneys for Defendants.

The contentions advanced by the defendants in their motions for judgment notwithstanding the verdict and for a new trial were considered and passed upon during the course of the trial. In the absence of briefs or the citation of any further authority, I am of the opinion that the rulings then made should be adhered to and that both motions should be denied.

Done in open court at Ketchikan, Alaska, this
4th day of April, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

Entered April 10, 1950.

[Endorsed]: Filed April 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Circuit Court of Appeals of the United States of America, for the Ninth Circuit:

Notice Is Hereby Given that Lawrence A. White and Erma R. White, the defendants above named, hereby appeal to the Circuit Court of Appeals of the United States of America for the Ninth Circuit, from that certain final judgment entered in the above-entitled cause by the above-entitled Court on the 27th day of February, 1950, in favor of the plaintiff and against the defendants, in the amount of Three Thousand Five Hundred dollars (\$3,500.00), together with costs and attorney's fees, the Court having overruled defendants' motion for new trial and for judgment notwithstanding the verdict on the 4th day of April, 1950.

Dated at Anchorage, Alaska, this 19th day of April, 1950.

DAVIS & RENFREW,
Attorneys for Appellants, Lawrence A. White and
Erma R. White.

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above-entitled Court, and to
Cuddy & Kay, attorneys for the plaintiff, and
to Whom it May Concern:

Please Take Notice that Lawrence A. White and
Erma R. White, defendants above named and the
appellants in this action, designate the entire record
of this action as the record on appeal and specifi-
cally direct that all the records and the files in the
Clerk's office pertaining to the above-entitled action
are to be included in such records, and among other
things such record is to include specifically the
reporter's transcript of the evidence introduced on
the trial of the cause and all exhibits introduced
on behalf of both parties to the action.

Dated at Anchorage, Alaska, this 24th day of
May, 1950.

DAVIS & RENFREW,
Attorneys for Appellants, Lawrence A. White and
Erma R. White.

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed May 24, 1950.

[Title of District Court and Cause.]

STIPULATION

Wendell P. Kay, of the firm of Cuddy & Kay, on behalf of the plaintiff-appellee, and Edward V. Davis, of the firm of Davis & Renfrew, attorneys for the defendants-appellants, hereby stipulate and agree that appellants may have to and including the 30th day of June, 1950, to file and docket the record on appeal in the above-entitled matter, and stipulate that in the event reporter's transcript has not been completed prior to the time above mentioned that the records and files in the Clerk's office may be docketed within such period without the reporter's transcript and the reporter's transcript may be docketed at a subsequent date after the same is completed.

Dated at Anchorage, Alaska, this 24th day of May, 1950.

CUDDY & KAY,
Attorneys for Plaintiff-
Appellee.

By /s/ WENDELL P. KAY.

DAVIS & RENFREW,
Attorneys for Defendants-
Appellants.

By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed May 24, 1950.

[Title of District Court and Cause.]

ORDER

Stipulation of counsel for the respective parties having been filed with this Court by the terms of which it is agreed between the parties that appellants may have until the 30th day of June, 1950, to file and docket the record on appeal in the above-entitled cause, and the Court being fully advised in the premises,

Now, Therefore, it is hereby ordered, adjudged and agreed that appellants may have an extension of time to and including the 30th day of June, 1950, to file and docket the record on appeal in the above-entitled cause.

It is further ordered, adjudged and decreed that in accordance with such stipulation in the event the reporter's transcript has not been delivered prior to the time when the appeal should be docketed in accordance with this order, then the Clerk is directed to forward the records and files in his office exclusive of the transcript to the Court of Appeals for the Ninth Circuit at San Francisco, California, in order that such cause may be docketed in such Court, and the reporter's transcript may be docketed at a later date after the same has been furnished.

Done in open Court at Anchorage, Third Divi-

sion, Territory of Alaska, this 24th day of May, 1950.

/s/ ANTHONY J. DIMOND,
District Judge.

Receipt of copy acknowledged.

Entered May 24, 1950.

[Endorsed]: Filed May 24, 1950.

In the District Court for the Territory of Alaska,
Third Division

No. A-5495

CLARA M. EAGLESON,

Plaintiff,

vs.

LAWRENCE A. WHITE and ERMA R. WHITE,
Defendants.

Monday, February 20, 1950

Before: George W. Folta, District Judge.

Appearances:

WENDELL P. KAY,

CUDDY & KAY,

Anchorage, Alaska,

Appearing for the Plaintiff.

WILLIAM W. RENFREW,

DAVIS & RENFREW,

Anchorage, Alaska,

Appearing for Defendants.

(Whereupon, at 11:30 a.m., after selection of the Jury the above-entitled matter came on for taking of testimony.)

PROCEEDINGS

The Court: You may outline your case, if you will.

Mr. Kay: Thank you, Your Honor.

May it please the Court, Ladies and Gentlemen of the Jury, Mr. Renfrew.

At this stage of the proceedings for the benefit of the new members of the Jury the attorney for the plaintiff states what he expects to prove. Then the attorney for the defendant outlines what they expect to prove. Then we put on the testimony of the witnesses. These opening statements are made to give you an outline so that you will know what to expect when the witnesses are put on the stand.

Now, the plaintiff in this case, Ladies and Gentlemen, expects to prove that in July of 1948 Mr. Lawrence White, the defendant here, was the owner of a business known as the L & W Chocolate Shop and that Mr. White was desirous of disposing of the business and that he accordingly listed it with Mrs. Eagleson, a licensed real estate broker in the Territory of Alaska, doing business here in Anchorage, for sale, and that he entered into a written authorization to sell, giving Mrs. Eagleson the exclusive right to sell the property for a period of time; that instrument, of course, will be introduced in evidence.

Then we expect to prove that in accordance with her obligations as a licensed real estate dealer Mrs. Eagleson [3*] did considerable work in an attempt

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

to dispose of the Chocolate Shop at the price Mr. White was desirous of getting—\$45,000.

Mrs. Eagleson was to receive a commission, according to the agreement, of 10 per cent of the sale price. Now, Mrs. Eagleson through her agency, we expect to prove, did a considerable amount of advertising, procuring of prospects, taking the prospects to Mr. White, and otherwise fulfilling her functions under the agreement.

The agreement expired. It was a listing for 60 days, but the agency, Mrs. Eagleson, continued to exercise her activities in trying to procure a buyer. In April of 1949 Mr. Rentschler, who is connected with Mrs. Eagleson, her agent we will prove, went down to the Chocolate Shop and got Mr. White to initial an extension on the agreement extending the agreement until the 30th day of April, 1949.

Now, there are some other provisions of the contract which will appear when it is read to you but we expect to prove, Ladies and Gentlemen, briefly, that Mrs. Eagleson fulfilled her function, that the Chocolate Shop was sold to a buyer which she was instrumental in selling and that therefore she is entitled to her commission on the sales price.

Now, of course, the sale price, the date of the sale and the amount for which it was procured or which it was sold will appear in evidence. It may be necessary for us to amend [4] our pleading to conform to the proof in that regard. We allege it was sold for \$40,000; it may be that it was sold for \$35,000 or \$37,500.

Mr. Renfrew: Just a minute. I will have to object to counsel making an argument.

Mr. Kay: I am not; I was just stating facts.

Mr. Renfrew: He is limited to what he intends to prove, Your Honor.

The Court: He is merely stating now his intentions of possibly asking, whatever the proof shows, that the pleading be amended to conform to, and I think that would be within the outline of his case. Objection is overruled.

Mr. Renfrew: Very well.

Mr. Kay: But we will prove, Ladies and Gentlemen, that the place was sold to a Mr. Pickering, who will undoubtedly appear as a witness. Mrs. Eagleson is entitled to her commission on the sale. That Mr. White has refused to pay that commission and that therefore we are requesting you Ladies and Gentlemen to see that he does. That is all.

The Court: Have you a statement, Mr. Renfrew?

Mr. Renfrew: Yes, Your Honor.

Ladies and Gentlemen of the Jury, in general, as Mr. Kay has pointed out to you, this is an action instituted by Mrs. Eagleson versus Lawrence A. White and Erma R. White. Mrs. Eagleson alleges in her complaint that she was employed [5] by Mr. and Mrs. White in the month of July of 1948 as a real estate agent to sell a certain business and she attaches to her complaint a copy of that employment agreement which, as counsel has stated,

will be undoubtedly introduced in evidence and read to you.

She alleges in her complaint that she was to receive a commission of 10 per cent for the sale of the business; that she had the exclusive right to sell it for 60 days. She alleges an extension of that contract of sale and states in her complaint that during the month of March, 1949, she was instrumental in obtaining one John Doe Pickering to purchase said property, and she asks the commission on the sale of the property at \$45,000.

Now, we will prove, Ladies and Gentlemen, that Mrs. Eagleson had never met the purchaser of this business until months after he had purchased the property nor had any agent of Mrs. Eagleson at any time ever discussed the sale of this property with the man who purchased it.

We will likewise prove that the property was purchased by the present owner after the original contract and likewise after any extension of that contract was ever given or granted and that the sale of the property to the present owner was after the contract which Mrs. Eagleson had had expired. Thank you.

The Court: You may call your first witness. [6]

Mr. Kay: Call Mr. Lawrence White.

LAWRENCE A. WHITE

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Your name is Lawrence White?

A. Lawrence A. White, yes, sir.

Q. And you are the defendant in this action, sir?

A. Sir?

Q. You are the defendant in this action?

A. Yes, sir.

Q. And Erma R. White is your wife?

A. Yes, sir.

Q. Were you, Mr. White, in 1948 and early 1949, the owner of a place of business here in Anchorage known as the L. W. Chocolate Shop?

A. L. W., that is right.

Q. Was your wife connected with you in the operation of that business?

A. That is right, certainly she was.

Q. Were you doing business as partners?

A. How is that?

Q. Were you doing business as partners, Mr. White?

A. I am a little hard of hearing. [7]

Q. Was your wife, Erma R. White, a partner of yours in the operation of the business?

A. Certainly she was.

Q. Then you had a partnership between you and Mrs. White to operate Chocolate Shop?

A. Yes, sir.

(Testimony of Lawrence A. White.)

Q. And did that partnership relationship continue down to the time you sold it?

A. Certainly.

Q. Now, in the spring of 1949, did you sell the L. W. Chocolate Shop to Mr. Pickering?

A. May the 2nd, 1949.

Q. Would you answer the rest of the question?

A. Yes, sir.

Q. You sold it to Mr. Pickering?

A. Yes, sir.

Q. What was the total sale price, Mr. White?

A. \$35,000.

Q. And how much did you receive down?

A. \$6,000.00.

Q. And was the balance to be paid according to the terms of a conditional contract?

A. That is right.

Q. And is that contract in escrow in the Bank of Alaska? A. That is right. [8]

Mr. Kay: That is all.

Mr. Renfrew: At this time, Your Honor, I would like to make a motion.

The Court: In the absence of the jury?

Mr. Renfrew: Yes, Your Honor. It is for summary judgment.

The Court: The jury may retire.

Mr. Renfrew: Your Honor, the motion which I am about to make is in the nature of what I believe to be a Motion for Summary Judgment, based upon the contention that the facts as stated in the complaint and the pleadings do not state a claim upon

which the plaintiff is entitled to enter relief and could not go to the jury.

I wish to call Your Honor's attention to the answers which are filed in it, particularly with reference to paragraph V.

First, I will take up paragraph II, Your Honor. The defendant admits the allegations of paragraph II of Plaintiff's Complaint which alleges, "That on the 7th day of July, 1948, plaintiff was employed by the defendants to procure a purchaser of a certain going business known as the L. W. Chocolate Shop at 744 Fourth Avenue, City of Anchorage, Alaska; that thereafter the agreement of employment was extended until the 30th day of April, 1949; and a copy of said authorization to sell is attached hereto, marked 'Exhibit 'A' and made a part hereof * * *'" [9]

Now with reference to the separate answer of Erma R. White, Your Honor will note that we admit the allegations of paragraph II of Plaintiff's Complaint except that the defendant alleges that the agreement was not extended for and on behalf of the defendant Erma R. White and said agreement expired by its terms as to such defendant on or about the 7th day of September, 1948.

Now I wish to again call to the Court's attention Paragraph V of the Separate Answer of both defendants which reads, "Defendant denies each and all of the allegations of Paragraph V of Plaintiff's Complaint, save and except * * *" and Paragraph V of Plaintiff's Complaint alleges, "That the agreed commission amounting to \$4,500.00 by

reason of the premises became due and payable by the defendants to the plaintiff on the date of said sale, but that the same has not been paid nor any part thereof."

Now, with reference to Paragraph V of the Separate Answer, Your Honor, we allege that the defendant denies all of the allegations of Paragraph V of Plaintiff's Complaint save and except the allegations that no money has been paid to the plaintiff by the defendant and that allegation is admitted, and in that connection defendant, Erma R. White—or in the case of the Separate Answer of Lawrence A. White, defendant, Lawrence A. White—alleges that the agreement between plaintiff and defendants had expired by its terms prior to [10] the time any sale of the premises was had and prior to the time that any agreement for sale of the premises was made, and that plaintiff was not instrumental in any manner in interesting the buyer in purchasing the property and such purchase was consummated by direct negotiations between the sellers and the buyer after the expiration of the agreement mentioned in plaintiff's Complaint and without any effort on behalf of plaintiff therein, and as defendant believes, plaintiff is not entitled to any commission on account of such sale.

There has been no replies to those allegations according to our copy of the pleadings and I was unable to find any in the Court's file when I last checked.

Now, in view of the fact that the plaintiff has made no reply——

The Court: Well, but what makes you think a reply is required?

Mr. Renfrew: Well, on the face of the pleadings as they now stand, the sale was made after the date of the contract as is alleged, then there is no issue.

The Court: But the reason I asked the question is that under the rules a reply is not required unless there is a counter claim.

Mr. Renfrew: Under the state of the pleadings, Your Honor, it is my interpretation that a reply is necessary if any [11] issue is raised which would show that there was no liability on the face of the action.

The Court: They are presumed to be denied under the new rules except where there is a counter claim. The Court may order a reply to be filed in the proper circumstances and upon motion, but there is nothing like that before the Court.

Mr. Renfrew: We take the position, Your Honor, that in view of the fact that there is no reply to the answer which sets up a defense on the grounds that this sale was made after any contract and the contract is put in as a part of the plaintiff's case in chief; that is, it is attached to the complaint, and they call a witness, the first witness they call who testifies—it is their witness now—and that witness testified that the sale was made May 2nd, which is after the terms of the contract and they haven't denied it, I think we are entitled to summary judgment.

The Court: Well, it is presumed to be denied. The motion is denied. You may call the jury.

Mr. Renfrew: Do I understand the reason that Your Honor states that no reply is necessary unless a counter claim is filed?

The Court: That is what the rules provide now, except where the Court orders a reply filed.

Mr. Renfrew: I understand, Your Honor. [12]

The Court: You may call your next witness.

Mr. Kay: Call Mr. Rentschler.

CARL T. RENTSCHLER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Your name is Carl A. Rentschler?

A. Carl T. Rentschler.

Q. And what is your occupation, Mr. Rentschler? A. Real estate broker.

Q. Are you connected with anyone in that business, Mr. Rentschler?

A. Yes, Clara M. Eagleson.

Q. And are you acquainted, Mr. Rentschler, with the defendant in this case, Lawrence A. White and Erma R. White?

A. Very well acquainted.

Q. Did you have occasion to have any discussion with Mr. and Mrs. White in the summer of 1948 with reference to the L. W. Chocolate Shop?

A. Yes, I did.

Q. Will you state, please to the Court and jury

(Testimony of Carl T. Rentschler.)

just what those conversations consisted of, Mr. Rentschler?

Mr. Renfrew: We object now to any conversations; if this action is based upon this contract the contract will [13] speak for itself.

Mr. Kay: All I was trying to lead up to was the signing of the contract.

Mr. Renfrew: It is admitted in the pleadings, isn't it?

The Court: I don't know whether you have admitted it or not. I think you did.

Mr. Renfrew: I didn't look at this case until twenty minutes to ten this morning, but that is my understanding, as fast as I read it this morning.

Mr. Kay: I am not so procrastinating. I looked at it yesterday afternoon, and it is my interpretation that is necessary to prove the contract.

Mr. Renfrew: It is admitted in Paragraph II.

The Court: If he admits it, it is sufficient.

Mr. Kay: Can't I still ask him about the conversations leading up to it?

Mr. Renfrew: It is immaterial.

The Court: It all depends whether the conversations would produce something that emerged in the contract.

Q. (By Mr. Kay): Did you have any conversations with Mr. White concerning listing his place for sale? A. Yes.

Q. And did those conversations result in the signing of an Authorization to Sell? [14]

A. Yes.

(Testimony of Carl T. Rentschler.)

Q. I will show you an instrument, ask you to examine it, and tell the jury whether you ever saw it before and what it is?

A. This is a contract authorizing the real estate firm of Clara M. Eagleson——

Q. Do you recollect it? A. Yes.

Q. Was it executed by Lawrence and Erma White on about the date that appears?

A. Yes.

Mr. Kay: I offer it in evidence.

Mr. Renfrew: Is it a copy of the one that is attached to the pleadings?

Mr. Kay: It was the original.

Mr. Renfrew: I notice, Counsel, that the notations on the back do not appear on the copy filed with the Complaint. Do they have any materiality?

Mr. Kay: I don't know what they are. I will ask.

Mr. Renfrew: I notice, Your Honor, on the reverse of this copy it bears notations there which are not upon the copy which was served with the complaint. At least, not upon the certified copy of the Complaint which we received. However, upon counsel's statement that they will not be referred to and have not any material effect upon this case, I have no [15] objection to the contract going in.

The Court: It may be admitted then and marked Plaintiff's Exhibit No. 1.

(Document referred to admitted in evidence

(Testimony of Carl T. Rentschler.)

as Plaintiff's Exhibit No. 1, Witness Rentschler.)

Mr. Renfrew: I will waive the reading of it.

Mr. Kay: I will be glad to read it.

PLAINTIFF'S EXHIBIT No. 1

Ladies and Gentlemen, in the upper left hand corner appears the words, Seattle P.I. and a word which I cannot read. Authorization to Sell. Confidential listing. I, Lawrence A. White, and Erma R. White of Anchorage, Territory of Alaska, have this day given Clara M. Eagleson, licensed real estate broker in and for the Territory of Alaska, the exclusive sale or transfer of real estate situated at Anchorage, Alaska, to wit: L. W. Chocolate Shop with installed equipment (\$5,000) doing business under the name above and consisting of combined candy making and retail and restaurant at 744 Fourth Avenue. Lease \$450 month rent until November, 1951, option 1 year.

"Property of and of record in the name of above.

"I hereby appoint and constitute Clara M. Eagleson as my lawful agent and authorize said agent to enter into written agreement for me and on my behalf and in my name, for the sale of said real estate of the agreed price of \$45,000.00.

"I agree to make a satisfactory deed and to give clear [16] abstract of title, if so required, showing the title to be fully vested in me.

"In consideration of the services of said agent

(Testimony of Carl T. Rentschler.)

in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner, whatever, in selling or transferring said property, I agree to pay said agent out of first payment a commission due on total sale price of 10% of \$45,000, payable at the office of the said agent. Any change in the price or terms agreed to by me, or in case a sale is made by owner while this agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property. Should a deposit secured by said agent be forfeited, one-half hereof may be retained by said agent and the balance shall be paid to me. The agent's share of any forfeited deposit, however, shall not exceed my commission.

“I hereby list said property exclusively with said agent for a period of 60 days. I agree to pay said agent the commission set forth in this agreement, if a sale is made within 60 days after the termination of this Authorization to Sell, to parties with whom said agent negotiated during the time of the Authorization to Sell.

“Authorization to Sell made in duplicate. Seller hereby acknowledges receipt of a copy of this agreement.

“Dated July 7, 1948. [17]

“Anchorage, Alaska

“/s/ LAWRENCE A. WHITE,

“ERMA R. WHITE.

(Testimony of Carl T. Rentschler.)

“Period Mar. 1, 1947-Feb. 28, 1948.

“Gross Receipts—\$118,224.84.

“Net Income—\$22,517.44.

“8 Employees.

“Extension until 4/30/49.

“L.A.W.”

[Original filed June 29, 1950.]

Q. (By Mr. Kay): Now, Mr. Rentschler, with regard to the notations which I last read on that contract—Extension until 4/30/49—did you have any conversations with Mr. White at the time of the procuring of that extension?

A. Yes, I did.

Q. Now——

Mr. Renfrew: May we have the time and place and persons present?

Q. (By Mr. Kay): Would you state the time, to the best of your recollection, the place where the conversation occurred and the number of persons who were present, if any?

A. My recollection, it was approximately April, April 8, 1949, and there were no persons present other than the normal customers in the shop. There was no one particularly who [18] was cognizant of what Mr. White and I were accomplishing.

Q. And what conversation took place then, Mr. Rentschler, between you and Mr. White?

A. I had been working on the sale of it——

Mr. Renfrew: Objected to as not responsive to the question.

(Testimony of Carl T. Rentschler.)

The Court: It is only available to the party conducting the examination. You have to object on some other grounds. That it is not responsive, that objection is only available to the one conducting the examination.

Mr. Renfrew: I object to it on the grounds that it is irrelevant, and immaterial, incompetent.

The Court: Overruled.

Q. (By Mr. Kay): You may answer the question. Read the question again.

(Question read.)

A. I had been working on the sale of the L. W. Shop for some time without having a contract——

Mr. Renfrew: I object to this on the ground that it states an opinion of what this witness has been doing for some time, not in the presence of the defendant.

The Court: The objection, as I take it, is that it is incompetent; and the objection is sustained.

Q. (By Mr. Kay): Just state what the conversation was, Mr. Rentschler. [19]

A. The conversation was to this effect: That since we have several interested parties to buy the property, that I would like to have a contract extension which would give me some security for the sale of that property. That was very agreeable with Mr. White and at that time he gave the extension which appears on the original contract.

Q. Now, at about that time, Mr. Rentschler, did you learn or know anything about a gentleman by the name of Pickering? A. Yes, I did.

(Testimony of Carl T. Rentschler.)

Q. Well, now, did you have any discussion or conversation with Mr. Lawrence White concerning Mr. Pickering? If so, tell us when it took place, who was present to the best of your recollection, and then I will ask you what was said.

A. On or about that time Mr. White mentioned the fact that Mr. Pickering, who was working in his shop at the time, was very interested in purchasing the property, but that he had not offered Mr. White the amount of money for the property that he desired.

Also, Mr. White mentioned that there was a possibility that we could get Mr. Pickering to give him the price that he wanted were I to attempt to secure someone who showed sufficient interest so that Mr. Pickering might think the property were being sold out from under him.

The conversation led to an agreement—verbal agreement—between Mr. White and myself that I would get the [20] interested buyers I had and attempt to coerce them into showing Mr. Pickering that the property was just about to be sold to some other person.

Mr. Renfrew: Now, we object to that testimony, your Honor, and ask that it be stricken on the grounds that it has no tendency to explain a written contract. It seems to be some separate concoction. Counsel can't rely upon a written contract and then rely upon some other agreement.

The Court: As I take it, I think this goes to another aspect of the case and that is whether or not a purchaser was secured or whether it was not

(Testimony of Carl T. Rentschler.)

this arrangement or what the plaintiff did was not the procuring cause of the sale, so it will have to be overruled on that ground.

Q. (By Mr. Kay): In other words, Mr. White asked you to——

Mr. Renfrew: I object to Counsel stating “in other words.” He can ask the question over again if he didn’t understand it.

Q. (By Mr. Kay): What did Mr. White request you to do at that time in connection with Mr. Pickering, if anything?

A. Mr. Pickering, it was stated to me by Mr. White, was a good prospect for buying the business and had made an offer that did not come up to the price that Mr. White wanted. I mentioned that possibly I should contact Mr. Pickering in [21] that it was my business selling real estate, and I might be able to accomplish the desired end. But, I was told by Mr. White that Mr. Pickering has a definite aversion to real estate agents and that I should not attempt to contact him in any way.

Q. What else did Mr. White request you to do in connection with Mr. Pickering, if anything?

A. Mr. White thought that, perhaps if I secured some prospects that I had been dealing with and brought them in the Shop and made it look like they were very interested in the property, that perhaps Mr. Pickering would come up with the additional amount which he desired for a purchase price.

Q. Did Mr. White mention any price to you at that time? A. To my knowledge, no.

(Testimony of Carl T. Rentschler.)

Q. Now, was anything else said during this conversation at that time that you can recall?

A. It was agreed by me that I would attempt to get these parties into the L. W. Shop in Mr. Pickering's presence so that we should accomplish what we had decided between ourselves.

Q. Now, after securing this extension of the agreement—Let's go back. After securing the original contract from Mr. White, what, if anything, did you do in connection with attempting to sell the place?

A. Myself — notwithstanding the office — contacted—and I had the names and dates—approximately 15 persons [22] who were personally taken through the shop for the purpose of purchasing. Now, I want to explain at this time that the original contract, if you will notice, was a confidential listing. Now, to a real estate agent, a listing of that sort instructs you that it should not be publicly advertised as a certain business in that Mr. White thought that it would be detrimental to his business to have the people know that it was being sold and also he didn't want his employees to know that it was being sold.

It put me in a very difficult position attempting to show the property to any prospective clients, but I did succeed in taking around ten people through it.

Q. Now, what, if anything, did you do after April 8, the date on which you obtained the extension in connection with the sale of the property, Mr. Rentschler?

(Testimony of Carl T. Rentschler.)

A. I took several persons through the shop after ducing Mr. Pickering to come up to the stipulated price, but I was instructed on several occasions to not contact Mr. Pickering and it is a real estate agent's duty to——

Mr. Renfrew: I object to this now as an opinion.

The Court: Objection sustained.

Q. (By Mr. Kay): You were instructed several times by Mr. White not to contact Mr. Pickering, is tht right? [23]

A. That is correct.

Q. Now, during April of 1949 did you have any conversations with a Mr. Bonecutter and a Mr. Easley concerning the situation?

A. Yes.

Q. I am not going to ask you what those conversations were, but do you recall approximately the date on which you talked to them?

A. Approximately between the 15th and 20th of April.

Q. As a result of those conversations did you do anything?

A. Yes, I passed the information to Mrs. Eagleson to the effect——

Mr. Renfrew: Just a minute, now. I——

Q. (By Mr. Kay): No, don't— Now, having passed the information to Mrs. Eagleson, did you do anything then in connection with Mr. White?

A. I contacted Mr. White and mentioned the conversations which I heard.

Q. Did you repeat what you had heard in those conversations to Mr. White?

A. Yes, I did.

(Testimony of Carl T. Rentschler.)

Q. Now, when did the conversations with Mr. White take place—that conversation?

A. Prior to April 30. [24]

Q. Just prior to April 30?

A. Why, between the 20th and the 30th.

Q. Do you recall where those conversations with Mr. White took place?

A. Both of them took place in the street.

Q. And what did you say to Mr. White and what did Mr. White say to you?

A. In the conversation with Mr. White I told him that I understood the L. W. Shop was sold and that since it was sold during the time that we had a listing on it, that he should square up with us regarding the commission involved in the sale and I suggested that he see Mrs. Eagleson.

Q. And what, if anything, did Mr. White say to you?

A. On the first occasion of meeting him he indicated that he would see her in the squaring off of the commission. On the second occasion I saw him was the day before he left for Outside and he was very discourteous and I mentioned that Mrs. Eagleson would like to see him and he said if she would like to see him she had better see him before the next morning because he was leaving.

Q. Did you have any further conversations, or were you present at any conversations with Mr. White? A. No.

Mr. Kay: That is all. [25]

(Testimony of Carl T. Rentschler.)

Cross-Examination

By Mr. Renfrew:

Q. Mr. Rentschler, when you identified the original contract which is offered in evidence, I presume as Plaintiff's Exhibit 1?

The Clerk: Yes.

The Court: Yes.

Q. (By Mr. Renfrew): —you stated that that was signed in your presence by both Mr. and Mrs. White? A. Yes.

Q. I wonder if that contract might be handed to the witness? Did you prepare that document, Mr. Rentschler? A. Yes.

Q. You understood at that time then, did you, that Mr. and Mrs. White owned this business as partners? A. Yes.

Q. And I notice that the one paragraph of the contract states "I agree to make a satisfactory deed and to give clear abstract of title, if so required, showing the title to be fully vested in me."

You knew, did you not, that there was no real estate involved here, but that this was merely a licensed business? A. Yes.

Q. And so that portion of the contract is just surplusage, [26] it didn't mean anything?

A. Yes.

Q. Now this property was listed exclusively with your agency for a period of 60 days, is that correct?

A. Yes.

Q. And the contract was dated July 7, 1948?

(Testimony of Carl T. Rentschler.)

Q. Now, when did the conversations with Mr. White take place—that conversation?

A. Prior to April 30. [24]

Q. Just prior to April 30?

A. Why, between the 20th and the 30th.

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A. Yes.

Q. Now this property was listed exclusively with your agency for a period of 60 days, is that correct?

A. Yes.

Q. And the contract was dated July 7, 1948?

(Testimony of Carl T. Rentschler.)

A. Yes.

Q. Correct. Now, what was your interpretation as to when the time expired on that contract?

Mr. Kay: I object to that as irrelevant. The document speaks for itself, sir.

Mr. Renfrew: I can ask him his interpretation of it.

Mr. Kay: Interpretations don't mean anything.

The Court: It seems to me it is immaterial.

Q. (By Mr. Renfrew): Did you feel, Mr. Rentschler, that after September 8, 1948, you had any interest, any exclusive interest, in the sale of those premises? A. Well——

Mr. Kay: I object to it as irrelevant or immaterial.

The Court: I don't get the significance of that date. What is it?

Mr. Renfrew: The contract, as counsel states, your Honor——

The Court: You mean 60 days from the time it is dated? [27]

Mr. Renfrew: Yes.

The Court: I think it is immaterial in connection with the extension.

Mr. Renfrew: I can tie it up with the extension, your Honor, that is what I am intending to do.

Mr. Kay: Whatever the witness felt, I don't see that that has anything to do with this case.

The Court: No, he is not the plaintiff. The objection is sustained.

Q. (By Mr. Renfrew): I will ask you, Mr.

(Testimony of Carl T. Rentschler.)

Rentschler, when you prepared this contract were you acting as the agent for Mrs. Eagleson?

A. Yes.

Q. And did you make the entire negotiation yourself? You stated you wrote the contract; did you make the negotiation with Mr. and Mrs. White?

A. Yes, under the guidance of Mrs. Eagleson.

Q. I think you did state that you knew the Whites were partners at that time?

A. I knew the condition prior to that time; there were three partners and the one was purchased out—was bought out evidently by the other two.

Q. And you knew that Mr. and Mrs. White were partners in the operation of the business?

A. Yes. [28]

Q. Is that why you had them both sign the contract? A. Yes.

Q. You have examined the contract under the word “extension”? There appears a 3 and then a dash and a 23 and above that dash is a 22. Would you state what, if anything, that referred to?

A. That is a notation irrelevant to the contract.

Q. It is written in pencil? A. Yes.

Q. And you wrote it, didn't you? A. No.

Q. Do you know who did? A. No.

Q. There is quite a bit of other writing there in pencil, isn't there? A. Yes.

Q. Did you write that? A. Yes.

Q. And did you write the “Carl” in pencil?

A. No.

Q. Do you know who wrote that?

(Testimony of Carl T. Rentschler.)

A. Mrs. Eagleson.

Q. You don't know what the 3-22-23, stands for?

A. No.

Q. Now, right near that you find "Extension until 4-30-49." [29] Did you understand that to be April 30, 1949? A. Yes.

Q. And did Mrs. White acquiesce in that extension? A. No.

Q. She wasn't there?

A. No, at the time she wasn't there.

Q. Now, from the 7th day of September, 1948, until about April the 8th, 1949, had you attempted in any way to dispose of this property?

A. Yes, I had taken several people through the premises and unless you are instructed by a property owner to——

Q. Just answer the question, if you will.

Mr. Kay: I object to that. Let the witness tell his story.

Mr. Renfrew: The Court has already told me I could object if it is not responsive.

The Court: It is not responsive to the question.

Q. (By Mr. Renfrew): What was your answer with regard to whether or not you made any attempt to sell the property between those dates?

A. Yes.

Q. And during that period of time you had no contract whatsoever, is that correct?

A. Other than this one; none other than this one. [30]

Q. None other than the contract which has been introduced in evidence?

(Testimony of Carl T. Rentschler.)

A. That is right.

The Court: I think we will recess at this time. Court will now be in recess until 2:00 o'clock, p.m.

(Whereupon, at 12:00 o'clock, Noon, the trial was recessed until 2:00 o'clock, p.m. of the same day, February 20, 1950.) [31]

Afternoon Session

The Court: The witness, Rentschler, may resume the stand.

CARL T. RENTSCHLER

called as a witness in behalf of the plaintiff, having previously been sworn, resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Renfrew:

Q. Mr. Rentschler, I understood your testimony before lunch to be to the effect that prior to your request of Mr. White to extend this contract of agency to your firm, which took place I believe you stated about April 8, 1949, as near as you can recall; you had some other prospects on your prospective list of potential purchasers of his and Mrs. White's business, is that correct?

A. Would you please restate your question? It was too lengthy. I couldn't follow it, Mr. Renfrew.

Q. Prior to lunch it was my understanding from your testimony that you stated you had some prospects or suspects for the sale of Mr. and Mrs.

(Testimony of Carl T. Rentschler.)

White's business, before you went to see him in April, when you asked for an extension of contract of agency, is that correct?

A. Yes, that is correct.

Q. And am I correct in my recollection that you stated [32] that it was about April 8, 1949, when you went to see him to ask for an extension of your contract?

A. Yes, that is correct.

Q. And at that time you had some prospects for the sale of the place of business?

A. Yes.

Q. Did you ever have a prospect that you took over there to show that place of business to that ever made you an offer?

A. No.

Q. And the man who subsequently bought the place, Mr. Pickering, did you ever have any conversation with Mr. Pickering?

A. No, I was told not to.

Q. Yes, I understood you to testify that Mr. White told you not to, but that was not my question. Did you ever have a conversation with him?

A. No.

Q. Did you know who he was?

A. Yes.

Q. Did you know him before you went over there on about April 8th?

A. No.

Q. Then it was not as a result of any thoughts about a sale to Mr. Pickering that you went there on April 8th? [33]

A. No.

Q. But you did have some other prospects in mind?

A. Yes.

Q. And on the strength of those other prospects that you had in mind you state that Mr. White gave

(Testimony of Carl T. Rentschler.)

you a continuation of your contract until and including April 30, 1949? A. Yes.

Q. Now, were you or were you not able to make a sale of those properties to any of those people that you had as a prospect? Yes or no?

A. No.

Q. Now, you likewise stated, according to my recollection, that you took somewhere in the neighborhood of ten people through the place of business—I suppose we refer to White's candy shop—to view it? A. Yes.

Q. Did you ever notify Mr. White of these prospects that you had? A. Oh, yes.

Q. Was he there when you took them through?

A. Yes.

Q. Now, was that prior to your arrangement of April 8, or after your arrangement of April 8?

A. I can't recall on that.

Q. Well, could you recall who these people were? [34] A. Yes.

Q. Will you do so?

A. Do you want the entire ten that I refer to?

Q. Yes, I want the entire ten that you took over there to the place of business.

A. There is a Mr. Urand, Mr. Michaels, a Mr. Edward Nowley——

Q. All right——

A. Mr. Edward Whaley.

Q. All right. A. Mr. McCollough.

Q. All right.

A. Mr. Osborne, Mr. Hudson.

(Testimony of Carl T. Rentschler.)

Q. All right. A. Mr. Herrick, Mr. Hall.

Q. Mr. Hall? A. H-a-l-l, Mr. Olivera.

Q. Now, you are reciting those names from some record you have there? A. Yes.

Q. What is the record?

A. The record is the daily book that the office keeps of all contacts in the office or outside of the office, listed by the day.

Q. All right then, with a certain amount of re-search you [35] could tell us what day you took those people over there, couldn't you?

A. Yes.

Q. I won't ask you to do this on the witness stand. You have that ability and you will be able to supply that information to us as to when you took those people over there?

A. I don't know that I can get exactly the day; I have notations that I contacted these people on the certain day that the notation was made here in the book. Whether or not it was done that evening or the next day is another question.

Q. Within 24 or 48 hours you could tell?

A. Uh huh.

Q. And your book I suppose would state whether or not you took them over to the place of business?

A. No, not necessarily.

Q. What record do you have that you took Mr. McNalley over to the place of business?

A. My own recollection.

Q. And is that true of all the other nine?

A. Yes.

(Testimony of Carl T. Rentschler.)

Q. You have distinct recollections of each particular time that you went over there?

A. Yes.

Q. Now, with that as a help, can you tell us whether or [36] not these ten resulted as prospects after your agreement of April 8 or prior to April the 8th? A. Both.

Q. Both. Then would you say that some of those ten were within 60 days of the time that you secured your listing of this property in July of 1948?

A. Yes.

Q. And how many of them would you say were after the April the 8th arrangement between you and Mr. White? A. Off hand, about three.

Q. About three. And were they the prospects that you had in mind at the time you asked for the extension? A. Yes.

Q. Now, on your direct examination this morning, I believe you used the word "coerce" once in reply to one of your counsel's questions. Do you recall whether or not you used that word?

A. Yes, I believe I did.

Q. And I gathered from your answer that you stated in substance that Mr. White and you had agreed to coerce Mr. Pickering into buying the premises? A. That is correct.

Q. Now, I wonder if you would elaborate on that just a little bit for us? Just how did that theory come into your mind? [37]

A. Well, as I stated this morning, it was made known to me by Mr. White that this Mr. Pickering

(Testimony of Carl T. Rentschler.)

was negotiating with Mr. White to purchase the L. W. Shop.

Q. Yes?

A. And as I stated before, he suggested that were I to get a prospect who would be made to appear very interested in the purchase, it might persuade or coerce Mr. Pickering into coming up the additional amount of money that was desired by Mr. White.

Q. Before you go any farther, what did Mr. White tell you was the amount Mr. Pickering had offered for the premises?

A. This morning I stated I couldn't remember that.

Q. Well, do you remember it this afternoon?

A. No, I won't say that I can.

Q. Well now, you distinctly recall a conversation, however, in which he said in substance, "If you can produce somebody who is interested in this property maybe that will increase Mr. Pickering's offer to where I can sell it to Mr. Pickering." Is that the idea?

A. And pay the commission.

Q. In other words, if you were able to produce somebody who would bring Mr. Pickering's offer up to \$45,000.00 you were to get a commission on the sale, is that your understanding? [38]

A. Definitely.

Q. You weren't able, were you, to produce anybody that even made an offer of \$12.90 for the place?

A. No.

Q. Now, I understood likewise this morning

(Testimony of Carl T. Rentschler.)

when you stated that you had two conversations with Mr. White on the streets of Anchorage—Do you recall making that statement? A. Yes.

Q. Would you care to make a statement now as to when that was that you had this conversation with Mr. White?

A. Well, the first conversation——

Q. The time I am interested in.

A. The time during the day?

Q. Yes. If you can place it with that degree of certainty I will be more than pleased.

A. What is your question?

Q. What was the time, relative to the month, day, or as close as you can get it?

A. The first conversation was on or about the 20th of April.

Q. The 20th of April. Now I will ask you, did you not state this morning that your first conversation was about April 30th? As near as you can recall it? A. No, I didn't.

Q. You didn't state that? [39] A. No.

Q. Now, I will ask you how you place it as April 20th?

A. There are certain other events that occurred right around that date that leads me to place it that particular day.

Q. Will you give us the benefit of what you mean by "certain other things"?

A. "Certain other things" that I referred to was that I was told about that date that someone con-

(Testimony of Carl T. Rentschler.)

versed with Mr. White and he made the statement——

Mr. Renfrew: All right now, I don't want you to——

Mr. Kay: Go ahead, Mr. Rentschler. All right, I will withdraw that.

Mr. Renfrew: Your Honor, I have asked him how he knows and he says "by certain other things"; he doesn't say that someone told him. Counsel knows that he can't repeat hearsay.

Mr. Kay: He knows that, too, and that is what he is trying to avoid.

The Court: It is hard to say as to whether his answer would be predicated on personal knowledge or would merely recite hearsay.

Mr. Renfrew: Do you understand, Mr. Rentschler, that you cannot testify as to what someone else told you if it wasn't said in the presence of the defendant? [40]

The Witness: Yes.

Q. (By Mr. Renfrew): Calling your attention to the fact that the reason you recall this as being about the 20th of April was due to the fact that you had a conversation with someone else, is that your answer? A. Yes.

Q. You had a conversation with someone else that makes you know it was about the 20th of April? A. Yes, relative to the case.

Q. How did you know that this conversation with this other person was about April 20th?

A. Because I can remember back that far.

(Testimony of Carl T. Rentschler.)

Q. Is that your answer, that the only reason that you pick April 20th instead of April 30th is because you can remember back that far?

A. I said on or about April 20.

Q. Well, could it have been April 30?

A. No, sir.

Q. Could it have been April 10?

A. No, sir.

Q. But you are positive, then, that it was April 20? A. No, on or about April 20.

Q. Would you give it just a 24-hour leeway one way or the other? [41] A. No.

Q. How much on either side, then, would you give it?

A. About a three day leeway either side.

Q. It might be as late as the 23rd or as early as the 17th of April? A. That is right.

Q. Do you have any means, any notes or anything that you can refer to as to why you put it within that six day period from the 17th day of April to the 23rd, 1949? A. No.

Q. None at all? A. None at all.

Q. It is just that you know that it happened during that period of time? A. Yes.

Q. Well, all right, will you elaborate a little on the conversations that you had. Maybe it will help you if you can remember where it took place. Where did it?

A. The first conversation with Mr. White?

Q. The conversation that took place either sometime that you are positive of now between the

(Testimony of Carl T. Rentschler.)

17th day of April, 1949, and the 23rd day of April, 1949, that conversation, the one you have just been talking about? A. On the sidewalk?

Q. On the sidewalk. [42] A. Yes.

Q. What sidewalk? A. 4th Avenue.

Q. All right, in Anchorage, I presume?

A. Yes.

Q. And could you locate it any closer than just on 4th Avenue? A. I don't believe so.

Q. You don't know whether it was down in front of the Anchorage Grill or up in front of the NC Company or by the bank? A. No.

Q. Just you know that it happened in Anchorage on 4th Avenue? A. Yes.

Q. And you have a distinct recollection of that?

A. Yes.

Q. It couldn't have been on 5th Avenue?

A. No.

Q. And yet you can't tell us where on 4th Avenue it was?

A. I would say it was west of F Street.

Q. West of F Street; well, now, may I ask what causes you to say that it was a little west and not a little east?

A. Mr. White's place of business happens to be in that locality and he was normally seen in that locality. [43]

Q. Well, all right, now did you go over to his place of business and see him? A. No.

Q. What? A. No.

Q. But you think it must have been in that lo-

(Testimony of Carl T. Rentschler.)

cality because that is where his place of business was? A. Yes.

Q. It couldn't have been down where he gets his hair cut, could it? A. No.

Q. Or perhaps where he gets gas for his automobile? A. I don't remember.

Q. Who was with you when you had this conversation? A. No one.

Q. What time of the day was it?

A. Don't recall.

Q. Was it daylight or dark?

A. I believe it was daylight.

Q. When you say "believe" why do you believe that?

A. Because I usually work during the day.

Q. You don't work anytime after six o'clock?

A. Oh, yes.

Q. Were you working when this happened or was it just a casual—— [44]

A. No, I was working.

Q. How do you remember that you were working and it wasn't just a casual bump into?

A. Well, normally I am usually at home evenings.

Q. Well, could this have been something that wasn't normal? A. It may have.

Q. Could this have taken place at night?

A. No, I don't believe so. I recall it during the day—during the working hours.

Q. You recall it was during the day during working hours? A. Yes.

(Testimony of Carl T. Rentschler.)

Q. Do you recall what kind of a day it was?

A. No, I don't believe I can.

Q. You don't recall whether the sun was shining, it was raining or snowing? A. No.

Q. Now, then, do you recall the conversation?

A. Yes, to a certain extent.

Q. That will help us a lot. Tell us what you said to Mr. White?

A. That I had received information that the property was sold.

Q. Is that what you said to him?

(No response.) [45]

Q. I asked you—my question is—What did you say to Mr. White?

A. "I understand that your place was sold, Mr. White."

Q. What did Mr. White say to you?

A. I think he denied it.

Q. All right, is that the substance of what was said in that first conversation? A. Yes.

Q. All right, when did you have another conversation with him?

A. It was on or about the end of the month.

Q. Well, on or about the end of the month, there is 30 days in April?

A. You should be able to place the day before Mr. White left for outside.

Q. I beg your pardon?

A. The day before Mr. White left for outside was——

(Testimony of Carl T. Rentschler.)

Q. —when you had the conversation with him? A. Yes.

Q. Would you be satisfied with that; do you know that he left the next day after your conversation? A. Yes.

Q. You know that? A. Yes.

Q. If Mr. White left here on the 16th of May then you [46] would be willing to agree that it was a day or two before that? A. Oh, no.

Q. You have got to stick with what you tell me or it won't do me any good to find out when he left here.

A. The day before Mr. White left prior to being served a subpoena to appear here at Court.

Q. The day before Mr. White left? Would you state what you mean by your answer, I don't follow that, what was your answer now, you had this conversation the day or two before he was served a subpoena to appear here in Court?

A. The day before.

Q. The day before he was served the subpoena?

A. Yes—summons. Do you have the file, that will show when the subpoena was served.

Q. The complaint shows that this case was filed on the 6th day of May, 1949. Now, the subpoena couldn't have been issued before the case was filed so it must have been on the 5th, not earlier than the 5th of May that you had the second conversation, is that correct? A. No.

Q. Well, when was it, then?

A. On or about the 30th of April.

(Testimony of Carl T. Rentschler.)

Q. Now, what places it in your mind as on or about the 30th of April? [47]

A. Mr. White had made some visits to the office on or about that date and the conversation took place on or about that date.

Q. Now, this second conversation took place where? A. On the street.

Q. On the street?

A. Yes, and that was in front of Sunshine Market.

Q. Now you say the way you place it on or about the 30th day of April was because he had made some previous visits to your office?

A. Yes.

Q. When had he made previous visits to your office? A. Shall I check my record?

Q. Yes if it will help you to answer it.

A. Well, I would say it was five days on this side of April 30 and four days on that side of April 30.

Q. In other words it would have to be either sometime between the 25th of April and the night of the fourth of May? A. Yes.

Q. You wouldn't quite get that down as close as you did the first conversation of six days—you want nine days on this one?

A. Yes, it has been almost two years ago.

Q. It is remarkable that you can remember it that period of time, Mr. Rentschler. [48]

A. Yes.

Q. Now then this conversation took place in

(Testimony of Carl T. Rentschler.)

front of the Sunshine Market, you remember that distinctly? A. Yes, very.

Q. Who was present? A. Mr. White.

Q. And yourself? A. Yes.

Q. No one else? A. That is correct.

Q. Was it a casual bump-into-conversation?

A. I was looking for him.

Q. You were looking for him?

A. Yes.

Q. In the Sunshine Market?

A. No, in that neck of the woods.

Q. Let's see, where was the Sunshine Market with relationship to the L. W. Candy Shop?

A. It is practically on the same corner but across the street.

Q. In the same block?

A. No, not in the same block.

Q. Is it farther west?

A. Yes, it is farther west.

Q. And across the street? [49] A. Yes.

Q. Were you making a systematic search of the town for him? A. Yes.

Q. And had you been to his place of business?

A. Yes.

Q. And how did you happen to go on up that way? Did someone direct you up that way?

A. No, I saw him.

Q. You saw him? A. Yes.

Q. Was he walking along the street?

A. Yes.

(Testimony of Carl T. Rentschler.)

Q. What time of the day was it?

A. I believe it was about eleven o'clock in the morning.

Q. About eleven o'clock in the morning. Now, tell us what that conversation was, what took place there; what did you say to Mr. White when you met him?

A. I said, "Mr. White, I understand your business is sold."

Q. Had you——

A. He had negotiated with Mrs. Eagleson regarding——

Q. Just a minute, I am asking you what you said to Mr. White and what he said to you and not anything else because it is not admissible. [50]

A. I said to Mr. White, "Don't you think you had better come over to the office and square up with the commission?"

Q. Uh huh.

A. And he said, "No." I said, "You realize you are obligated to, don't you?" and he said, "No."

I said, "Well, Mrs. Eagleson would like to see you before you leave town—." No, I am wrong in that. I said, "Mrs. Eagleson would like to see you" and he said, "Well, she had better see me before tomorrow morning because I am leaving."

The entire conversation was rather short.

Q. And in general now you have stated what the entire conversation was? A. Yes.

Q. In substance you asked him to make a pay-

(Testimony of Carl T. Rentschler.)

ment and he said, "I don't owe you anything." Is that the idea? A. Yes.

Q. And you referred to Mrs. Eagleson and he said, "If she wants to see me she will have to see me before I leave town." A. Yes.

Q. You only had two conversations with him that you referred to, that you had on the street?

A. Regarding what, Mr. Renfrew? [51]

Q. You testified this morning you had two conversations with him after—I thought you said April 30 this morning, but I am willing now to limit it to the time——

A. Let's make it April 8.

Q. All right. After you went over and got an extension until the end of April? A. Yes.

Q. ——on your contract. You had two conversations with him after that on the street, isn't that true?

A. We just limited that it might be a little bit over the month a while ago, the second conversation.

Q. But you only had two conversations with him? Just two?

A. I won't say that I only had two.

Q. Do you remember now having any more?

A. No.

Q. Then were these the two conversations that you referred to when you testified for Mr. Kay this morning? A. That is right.

Q. The two that you have just related now?

A. Uh huh.

(Testimony of Carl T. Rentschler.)

Q. Is that correct? A. Yes.

Q. This morning did you not testify that when you had the first conversation with him that he indicated to you [52] that he would go over and settle up with Mrs. Eagleson? Did you not state that on this witness stand this morning?

A. I don't believe I did.

Q. You don't believe you said that?

A. No.

Q. If you did say it this morning were you erroneously stating it? A. No.

Q. Well, did he say, "I will go over and pay Mrs. Eagleson"? A. I don't recall.

Q. Now as a matter of fact for me a moment ago he denied even selling it at the first conversation. Do you remember that far back?

A. Yes.

Q. And isn't that the truth that he did deny that the place was sold? A. Yes.

Q. Then he couldn't have said, "I will go over and settle up with Mrs. Eagleson," could he, or even implied it or inferred it as you said this morning, if you did say that?

A. That is right.

Q. He couldn't have done anything like that?

A. That is right. [53]

Q. And on the second conversation he definitely told you that he didn't owe her anything, isn't that right? A. That is right.

Q. On no conversation that you had with him that you referred to this morning did he imply that

(Testimony of Carl T. Rentschler.)

he would go over and settle with her, is that your testimony now? A. That is right.

Mr. Renfrew: I wish to excuse the witness, Your Honor, with one point. I would like to have him if possible to arrange for me where I could recall him and have him state the dates according to his books. I think he said he could during a twenty-four hour period as to when he took these ten customers through this establishment.

The Court: You may recall him for that purpose.

Mr. Kay: Could I ask an additional question on redirect?

Redirect Examination

By Mr. Kay:

Q. Mr. Rentschler, these two discussions with Mr. White that Mr. Renfrew has been questioning you about, on the first of those conversations that would be the one somewhere in the vicinity of April 20, did you request Mr. White to see Mrs. Eagleson at that time, to the best of your recollection?

A. No, I don't believe so.

Q. Do you know whether or not Mr. White did see Mrs. [54] Eagleson prior to the second conversation? A. I understand he did.

Mr. Refrew: I object to that now as a conclusion.

Q. (By Mr. Kay): You don't know that of your own knowledge? A. No.

Mr. Renfrew: That is all, Mr. Rentschler. Thank you.

(Witness excused.)

Mr. Kay: I will call Wendell Dayton.

WENDELL DAYTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Would you state your name, please, Mr. Dayton? A. It is Wendell Dayton.

Q. And where do you live, sir?

A. In Spenard.

Q. Are you employed here in the City of Anchorage, Mr. Dayton? A. Yes, I am.

Q. And what is the nature of your occupation, sir?

A. I am an office equipment repair man for Snyder Office Supply. [55]

Q. Are you acquainted with Mr. Lawrence White, the defendant in this case—the gentleman sitting over at the table there? A. Yes, sir.

Q. Mr. Dayton, I will ask if you recall having any conversation with Mr. White in the month of April, 1949—that is, last April, sir?

A. I probably had a lot of conversations with Mr. White during that period.

Q. Well, do you recall specifically any conver-

(Testimony of Wendell Dayton.)

sation with him relative to a sale of the Chocolate Shop? A. Yes, I do.

Q. Now, Mr. Dayton, can you place the approximate date of that conversation to the best of your ability, sir?

A. I would say it was some time between the 15th and the latter part of the month.

Q. That would be the month of April, 1949?

A. That is the month of April.

Q. And where did that conversation take place if you recall?

A. In the Candy Shop, at the counter.

Q. Would you state, Mr. Dayton, just what you said to Mr. White and what he said to you to the best of your ability to recall, sir?

Mr. Renfrew: Was any one present? I would like to [56] know who was present at this conversation.

The Court: Well, of course, that would have to be stated—the time and circumstances and the persons present if it was the case of laying the foundation for an impeachment, but it doesn't have to include those details on an examination of this kind for another purpose.

Of course you may go into that.

Mr. Renfrew: I understand that. I was just trying to save time. It is all right.

Q. (By Mr. Kay): If anyone else was present, Mr. Dayton, will you state it to the best of your recollection?

(Testimony of Wendell Dayton.)

A. I don't recall but I think my wife was with me at the time.

Q. Well now, anyone else that you can think of?

A. No, I don't recall anyone else.

Q. Would you just state in your own words, Mr. Dayton, what that conversation was to the best of your ability?

A. I noticed some new faces in the shop and I asked Mr. White if that was his new helper and the conversation got around that he said he was selling it to those people—to the new face in there.

Q. And was anything else said as far as you can recall?

A. Oh, I think we talked around about what he was going to do and things like that, but I don't recall exactly. [57]

Mr. Kay: No further questions.

Cross Examination

By Mr. Renfrew:

Q. Mr. Dayton, you can't place this conversation within a day or two one way or the other, can you? A. No, I couldn't.

Q. It may have been any time from the middle of April to the first week in May, couldn't it?

A. Possibly. However, I think it was still in the month of April.

Q. And do you have any particular reason to believe why it was still in the month of April instead of in the first week of May?

(Testimony of Wendell Dayton.)

A. Off hand, no.

Q. And the conversation, the gist of it was that you inquired into the strange faces and he said I am going to sell or I am selling my business to these people? A. Yes.

Q. He didn't say, "I have made a sale and I am on my way Outside and the contract is signed." Did he? A. No.

Mr. Renfrew: That is all, Mr. Dayton, thank you.

Redirect Examination

By Mr. Kay:

Q. Did he say anything, Mr. Dayton, to indicate that [58] they had bought the place or were buying the place?

A. He indicated that he was selling it to them. He didn't indicate that they had made a contract or anything else of that sort.

Q. Had you noticed those faces around there for some time, Mr. Dayton? A. Yes, I had.

Q. What was that answer?

A. I had noticed those faces in there from time to time prior to this conversation with Mr. White.

Q. And for about how long had you noticed these people could you say?

A. I would say about two weeks, possibly more.

Q. And are you sure in your own mind that this was before the first of May, Mr. Dayton?

A. Yes, I am.

Mr. Kay: That is all.

(Testimony of Wendell Dayton.)

Recross-Examination

By Mr. Renfrew:

Q. Maybe I misunderstood you. Didn't you say when you came in you noticed some strange faces in there and that is what caused you to make an inquiry?

A. That was the first time I had had a chance to talk to Mr. White about those strange faces.

Q. And had it been preying on your mind for about three [59] weeks?

A. I don't pry into other people's business but Jim and I had always been on good terms and had done a lot of talking. I had noticed when he had changes of personnel in there.

Q. I understand that. Now, could I understand your testimony in substance to be that you had seen these strange people in there for two weeks or longer? A. Yes.

Q. But this is the first time you had gotten around to asking him about these strange people?

A. Yes.

Q. And you were friendly with him and talked over his business affairs with him, did you?

A. Not particularly talked over his business affairs.

Q. Well, his employees?

A. (No response.)

Q. His employees, did you talk about them?

A. Might make a comment about them being a new one in there.

(Testimony of Wendell Dayton.)

Q. And you had done that before I suppose?

A. Yes.

Q. You frequented the place, didn't you?

A. Yes, I was in there quite a few times.

Q. Weren't you in there several times a week?

A. Yes.

Q. And yet you are definitely able to state that this took place between the 15th day of April and the last day of April? A. Yes.

Q. And it couldn't have been three or four days in May? A. No.

Q. All right. Why?

A. That I just can't answer.

Q. By any chance are you buying any property through Mrs. Eagleson now? A. No.

Q. Did you—— A. No.

Q. Well, how did you happen to be here to testify? A. I was called by Mrs. Eagleson.

Q. How did Mrs. Eagleson know about this story?

Mr. Kay: She will be glad to tell me when she gets on the stand.

Q. (By Mr. Renfrew): Will you answer that question? How did Mrs. Eagleson happen to know about this if she called you?

A. That I don't know. I was rather surprised at the time that she asked me if I would testify. I was wondering [61] how she got ahold of my name for it.

Q. Did she ask you if you would testify that you overheard or had a conversation with Mr. White

(Testimony of Wendell Dayton.)

in which you heard Mr. White remark to you that he was selling his place of business to certain people? Did Mrs. Eagleson ask you that?

A. Yes.

Q. And you said that you would? A. Yes.

Q. Now did she tell you to be sure that it was between the 15th of April and the 30th of April?

A. No.

Q. How did she know that you had overheard this conversation or that you had had such a conversation with Mr. White? How did she know that? A. That I don't know.

Q. A little bird must have told her?

A. I wouldn't put it that way.

Q. Did you tell her? A. Not personally.

Q. Well, did you know Mrs. Eagleson before she called on you to be a witness in this case?

A. Yes.

Q. Did you not testify a moment ago that you were surprised when Mrs. Eagleson called you, that you wondered [62] how she got your name? Didn't you just testify that?

A. I just testified that, yes.

Q. You weren't surprised, were you, because you already knew her?

A. Sure, I already knew her but I was surprised that she knew of the conversation that I had with Mr. White.

Q. Oh, and you don't know how she found out about that conversation? A. No.

Q. She never told you? A. No.

(Testimony of Wendell Dayton.)

Q. Did you ever talk about this with your wife?

A. Why, I presume I did.

Q. Do you know whether your wife was with you or not? A. Off hand, no.

Q. But you are surprised when Mrs. Eagleson called you in and knew your name and knew that you had had such a conversation? You were surprised at that? A. Yes.

Q. But you weren't sufficiently surprised to ask her, "Mrs. Eagleson, how in the world did you ever find out I had such a conversation?" You weren't that surprised, were you? A. No.

Q. Can you give us, now, after thinking this thing over, [63] Mr. Dayton, any reason why you know this conversation which you had took place not later than April the 30th?

A. Off hand, no.

Q. Well, if you can think up one let us know after a while, will you? That is all.

Further Redirect Examination

By Mr. Kay:

Q. Mr. Dayton, how long have you known Mrs. Eagleson? A. Since the summer of '48.

Q. How long have you known Mr. White?

A. I——

Mr. Renfrew: We object to this as immaterial and irrelevant——

Mr. Kay: You are trying to show——

(Testimony of Wendell Dayton.)

Mr. Renfrew: Just a minute, I am making an objection.

The Court: You will have to give the Court time to speak.

Mr. Renfrew: That is what I was trying to do without his interruption.

Mr. Kay: I just wanted to know how long he had known Mr. White.

The Court: Objection overruled.

Q. (By Mr. Kay): You may answer.

A. I have known Mr. White since '46. [64]

Q. Are you any better friend of Mrs. Eagleson than you are of Mr. White?

Mr. Renfrew: I object to that as immaterial, irrelevant——

The Court: It goes to the witness interest in the case after your examination.

Mr. Renfrew: It is his witness and it is a self-serving declaration.

The Court: But your examination of him would tend to throw light or tend to show, perhaps, an interest because of his relationship to that of the plaintiff, so the objection is overruled. It is all a point of interest.

Mr. Renfrew: Your Honor, I don't wish to argue with the Court but I will submit to the record that the only question I asked him was how long he had known Mrs. Eagleson in response to his statement that he was surprised that she got his name which he clarified.

The Court: As a matter of fact you questioned

(Testimony of Wendell Dayton.)

him about practically whether or not it was suggested to him what he should testify, so that makes the examination of this kind now proper. *Examination* is overruled.

Q. (By Mr. Kay): You may state the answer.

A. I have always considered Jim a friend of mine as well as Mrs. Eagleson. [65]

Q. By "Jim" you mean Mr. White?

A. Yes.

Q. Did anyone suggest to you in any way what your testimony was to be in this case? A. No.

Q. Attempt to put any words in your mouth?

A. No.

Further Recross-Examination

By Mr. Renfrew:

Q. Well now, when did you first talk this case over with Mr. Kay?

A. First conversation with Mr. Kay was just prior to court time.

Q. Today? A. Yes.

Q. And when did you first talk it over with Mrs. Eagleson? A. When she first called on me.

Q. All right. When was that?

A. That I don't recall. It was after the sale of the place, I presume, when she was interested in securing witnesses.

Q. Roughly would you say it was in December, 1948, or was it in January, 1949, or was it in July of '49?

(Testimony of Wendell Dayton.)

A. Well, as nearly as I can recall, it must have been [66] in May of '49.

Q. In May of '49? A. Yes.

Q. Did you write down what you told Mrs. Eagleson at that time? A. No.

Q. And have you talked with her since May about it?

A. Yes, I have had other conversations with her about it.

Q. How many times?

A. Two times, I think.

Q. Do you remember when those two times were? Was that exclusive of the one in May or two besides the one in May?

A. Two besides the one in May.

Q. Do you remember when those other two were?

A. One was this month sometime and one later on, the latter part of last year, possibly November or December.

Q. November or December and then one this month? A. Yes.

Q. Now during all three of those conversations that you had you have steadfastly maintained that this conversation you had was not earlier than the 15th of April and not later than the 30th of April?

A. Yes. [67]

Q. Well, I will ask you once more now, can you remember why it couldn't have been on the first—the second of May? A. No, I can't recall.

Mr. Renfrew: That is all.

Mr. Kay: That is all.

(Witness excused.)

The Court: Unless your next witness is short, we will take a recess at this time.

Mr. Kay: I was going to suggest we take a recess now.

(Short recess.)

The Court: You may proceed.

Mr. Kay: I would like to call Mr. Rodney Johnston.

RODNEY L. JOHNSTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Johnston, would you state your name, please, and your occupation?

A. Rodney L. Johnston, cashier at the Bank of Alaska.

Q. And how long have you been cashier there, sir?

A. About two years.

Q. Mr. Johnston, do you have with you on return of our subpoena a copy of the contract between Lawrence White and [68] Mr. Pickering covering the sale of the L. W. Chocolate Shop?

A. Yes, I have.

Q. From whom did you receive that contract, if you know, sir?

A. I was not the officer that handled the escrow

(Testimony of Rodney L. Johnston.)

to my knowledge so I don't know which officer of the bank received the escrow.

Q. You don't know of your own knowledge how the contract came to be in the bank, do you?

A. No, I do not know that.

Q. Was it in the bank and do the records in the bank reveal that it was received by the bank in the ordinary course of business?

A. That is right, yes.

Q. And is the contract now held in escrow by the Bank of Alaska? A. Yes, sir.

Q. Are you familiar with the signatures of any of the parties to that contract?

A. Yes, I believe I recognize the signatures.

Q. Is it signed by Mr. Lawrence A. White. Do you recognize his signature? A. Yes, sir.

Q. Do you recognize the signature of Mr. Pickering? [69] A. Yes, I do.

Mr. Renfrew: Do you intend to offer it in evidence?

Mr. Kay: I do. I would like to offer it in evidence at this time, Your Honor. However, it is a part of the records of the bank and I would like to ask that that we be permitted to copy the contract and return the original to the bank immediately.

The Court: That may be done.

Mr. Renfrew: May I have just a moment here? Maybe we can save some time, Your Honor. May I inquire one or two questions of the witness?

The Court: Yes.

(Testimony of Rodney L. Johnston.)

Mr. Renfrew: By whom is that contract notarized?

The Witness: Catherine Brundage.

Mr. Renfrew: You are familiar with her signature?

The Witness: Yes.

Mr. Renfrew: Is that the official signature of Catherine Brundage?

The Witness: I would say it was.

Mr. Renfrew: And her notarial seal is affixed?

The Witness: It is.

Mr. Renfrew: And the contract is signed under seal?

The Witness: It is.

Mr. Renfrew: I have a copy of that contract if you wish to compare it and if it is satisfactory you can introduce [70] this one and if you like have the bank keep their own.

The Court: You say it is a carbon of the original?

Mr. Renfrew: I say it is a carbon copy of the original. It is our office copy of the contract.

The Court: There is no necessity of comparing it. It is made by the same process, isn't it?

Mr. Renfrew: Well, frequently, Your Honor, as the Court well knows, in practicing law we leave certain blanks. For instance, the dates, and sometimes the copies do not show the signatures because when you make up the copy of the contract we don't know who is going to sign it or who is going to be the witnesses.

(Testimony of Rodney L. Johnston.)

I would like to have Mr. Johnston compare the dates and the signatures of the witnesses and the signatures of the parties with the original so that it will be a true copy.

The Court: Well, if he can make that comparison in a short time. It is not easy for one person to make a comparison.

Mr. Renfrew: I think that can be done in one minute, Your Honor, it is just the dates.

The Court: If he can do it, very well.

The Witness: I couldn't tell whether it was an exact copy without reading the whole thing. [71]

Mr. Kay: Is the date the same, the filled in blanks?

The Witness: The date of the contract is dated the first day of May, 1949.

The Court: You can tell where each paragraph ends on each page and whether it occupies the same relative position on the copy.

The Witness: I would say it was a copy.

Mr. Renfrew: I will ask you to state if the dates and the signatures of the witnesses are the same?

The Witness: Yes.

Mr. Renfrew: I am willing that counsel may introduce our office copy of the contract providing we may have it back at the close of the case.

Mr. Kay: It is satisfactory to me, Your Honor.

The Court: With one provision and that is that it shouldn't be surrendered if there should be any appeal or any likelihood of an appeal.

(Testimony of Rodney L. Johnston.)

Mr. Kay: If there is an appeal we can stipulate to provide a copy.

The Court: Very well, it may be admitted, then, on that understanding, as Plaintiff's Exhibit No. 2.

(Contract referred to admitted in evidence as Plaintiff's Exhibit No. 2, Witness Johnston.)

PLAINTIFF'S EXHIBIT No. 2

Agreement of Sale

This Agreement, made and entered into this 1st day of May, 1949, by and between

Lawrence A. White and Erma R. White, his wife, of Anchorage, Alaska, the parties of the first part, (hereinafter called the "Sellers"), and

Herbert E. Pickering, of the same place, the party of the second part, (hereinafter called the "Buyer").

Witnesseth:

That for and in consideration of the sum of Six Thousand (\$6,000.00) Dollars, lawful money of the United States of America, to the Sellers in hand paid by the Buyer concurrently with the execution of this agreement, the receipt of which is hereby acknowledged, and in consideration of the further sum of Twenty-nine Thousand (\$29,000.00) Dollars, in like lawful money, to be paid to the Sellers by the Buyer as hereinafter provided, the Sellers agree to sell to the Buyer, and the Buyer agrees to buy of

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

and from the Sellers all that certain personal property and business situated at Anchorage, Third Judicial Division, Territory of Alaska, and more particularly described as follows, to-wit:

That certain business heretofore operated by the Sellers and known as the L-W Chocolate Shop and Fountain, including, but not limited to, all the stock-in-trade, merchandise, equipment, supplies, furniture, fixtures, and all other assets of such business, and including particularly the unexpired portion of the lease covering the premises upon which the business is conducted, hereinafter more fully provided.

The Sellers are particularly excluding from this sale, cash on hand and in banks and accounts receivable as of the close of business, April 30, 1949. The Sellers likewise are excluding from this sale the trade name of the business as is hereinafter more fully set forth.

Together with all the accessories and appurtenances thereunto belonging or in anywise appertaining.

It is agreed that the total purchase price to be paid by the Buyer to the Sellers for the above described property is the sum of Thirty-five Thousand (\$35,000.00) Dollars, of which the sum of Six Thousand (\$6,000.00) Dollars has been paid concurrently with the execution of this agreement, as above set forth, and the Buyer agrees to pay the balance of Twenty-nine Thousand (\$29,000.00) Dol-

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

lars as follows: Five Hundred (\$500.00) Dollars, plus interest as hereinafter provided on the 20th day of June, 1949, and a like sum of Five Hundred (\$500.00) Dollars, plus interest as hereinafter provided, on or before the 20th day of each and every month thereafter until the total unpaid balance, together with such interest, shall have been paid in full. The Buyer agrees to pay interest to the Sellers on the actual unpaid balance due from time to time at the rate of 6% per annum, interest accrued to each monthly payment being payable monthly at the same time and place as payments on the principal are to be made, and in addition to the principal payments of \$500.00 per month. All payments of principal and interest are to be made to the Bank of Alaska, Anchorage, Alaska, for the account of the Sellers.

The Sellers specifically agree that the Buyer may make any payment in addition to the sum of Five Hundred (\$500.00) Dollars per month, plus interest, any time that he may wish so to do, and agree that the Buyer shall have the privilege of paying any part or all of the unpaid balance due to the Sellers at any time, so long as he pays to the Sellers at least Five Hundred (\$500.00) Dollars per month, plus accrued interest, as above provided.

It is agreed that the Buyer has made arrangements with the owner of the business premises for the owner's consent to the assignment of the lease and for an extension of the term, and the Sellers

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

are to perform their obligations in connection with the lease by assignment of the same to the Buyer. From the date of assignment of the lease the Buyer agrees to save and hold the Sellers harmless as against any loss or liability in connection with the lease except in the event the Sellers retake the property because of default by the Buyer as hereinafter provided.

It is specifically agreed that title to the above described property and the whole thereof shall remain in the Sellers until the entire purchase price shall have been paid, and until that time, the Buyer shall have no right to sell, transfer, assign or otherwise to dispose of or attempt to dispose of the property herein concerned.

It is specifically understood and agreed that said property is free and clear of all liens and encumbrances, and that the Sellers will pay any and all outstanding liabilities and accounts payable of the business above described, and hold the Buyer harmless against the same. The Buyer agrees that he will save the Sellers harmless as against any loss or liability in connection with any of such obligations or liabilities of the business incurred after April 30, 1949, including the price of goods now on order but not yet received.

Sellers and Buyer agree that the Sellers are not selling the trade name of the business, but the Buyer shall have the right to use the trade name until notified by the Sellers that they wish to use said

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

name for a period of six months after he has been notified by the Sellers that they do desire to resume the use of such trade name.

The Buyer shall be entitled to the possession of the above described property from the 1st day of May, 1949, and for so long a period of time as he shall keep all the covenants and agreements on his part herein agreed to be kept and performed, but should the Buyer default in the making of any of the payments due under the terms of this agreement, or should he fail to keep or perform any agreement on his part herein made to be kept or performed, then and in that event the Buyer shall lose his right to the possession of the property, and the Sellers shall be entitled to retake the property, as hereinafter provided, and in that event the Buyer agrees to remove from the premises quietly and peaceably and without process of law, and agrees to deliver to the Sellers, or their agent, the business and property in as good condition as the same now are, reasonable wear and tear of the property excepted.

Provided, however, that in the event the Buyer is unable to make any particular monthly payment as the same becomes due, he shall notify the Sellers in writing and the Sellers shall allow the Buyer thirty (30) days thereafter to make such payment.

Until the entire purchase price of the property above described, together with interest thereon, shall have been fully paid by the Buyer to the Sell-

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

ers, the Buyer expressly agrees that: (1) he will pay any and all taxes and assessments accruing after the date of this agreement; (2) he will not permit nor suffer any lien or liens or other encumbrances to be placed against the above described property, or any part thereof; (3) he will keep the property above described insured at all times during the life of this agreement against loss by fire to at least the amount of \$17,500.00 and payable in the event of loss by fire as the interests of the parties may appear; and (4) that he will not assign this contract, or any interest thereunder, without first receiving the written consent of the Sellers to such assignment.

It is agreed between the Sellers and the Buyer that in the event the Buyer shall at any time sell the above described property, that the Buyer shall immediately pay to the Sellers the balance due under this agreement.

Time and each of the terms, conditions and covenants hereof are hereby declared to be of the essence of this agreement, and acceptance by the Sellers of any payment provided herein after the same is due or past due shall not constitute a waiver by them of this or any provision of this contract as to any subsequent default or breach.

In the event that the Buyer shall make any default in any deferred payment as hereinabove provided, at the time that the same may become due, or at the termination of the grace period herein-

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

above provided, or upon any failure by the Buyer to perform any of the covenants and agreements on his part herein agreed to be performed, and including, but not limited, to the agreement to permit no liens or encumbrances, and to pay taxes, assessments and impositions, and to keep insurance, the Buyer shall forfeit any right he might otherwise have to the premises and shall lose any right to demand a bill of sale to the property from the Sellers, as hereinafter provided, and thereupon the Sellers, at their option, may declare this contract terminated and may retain any and all moneys theretofore paid by the Buyer to the Sellers as rent for the use of the premises by the Buyer and as liquidated damages due to the Sellers for the nonfulfillment of this agreement by the Buyer.

The Sellers agree to deposit a copy of this agreement with the Bank of Alaska, at Anchorage, Alaska, and to deliver therewithin in escrow to said Bank of Alaska a good and sufficient Bill of Sale conveying the property above described to the Buyer, and upon the Buyer making full payment of all sums due to the Sellers under the terms of the agreement herein contained, and including interest, the escrow holder is to deliver the said Bill of Sale to the Buyer, but should the Buyer make default in any payment due to the Sellers hereunder, or should the Buyer fail to keep any agreement herein made on his part to be performed, the Sellers may, at their option, terminate this agreement and

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

may give notice of the default or breach to the escrow holder, and upon demand therefor by the Sellers, the said escrow holder shall return the said copy of this agreement and the said bill of sale to the Sellers.

It is mutually agreed that the provisions of this agreement shall apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto, except that the right of the Buyer to assign this contract is limited as hereinabove set forth.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year in this agreement first above written.

/s/ LAWRENCE A. WHITE,

/s/ ERMA R. WHITE,

Sellers.

/s/ HERBERT E. PICKERING,

Buyer.

Signed, sealed and delivered in the presence of:

/s/ CATHERINE BRUNDAGE,

/s/ RICHARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 2nd day of May, 1949, before me, the undersigned, a Notary Public

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)

in and for the Territory of Alaska, duly commissioned and sworn as such, personally appeared Lawrence A. White and Erma R. White, known to me and to me known to be the individuals named in and who executed the foregoing instrument, and they acknowledged to me that they signed and sealed the same as their voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and official seal the day and year first above written.

/s/ CATHERINE BRUNDAGE,
Notary Public for Alaska.

My Commission expires 3/3/51.

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 2nd day of May, 1949, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn as such, personally appeared Herbert E. Pickering, known to me and to me known to be the individual named in and who executed the foregoing instrument, and he acknowledged to me that he signed and sealed the same as his voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my

(Testimony of Rodney L. Johnston.)

Plaintiff's Exhibit No. 2—(Continued)
hand and official seal the day and year first above
written.

/s/ CATHERINE BRUNDAGE,
Notary Public for Alaska.

My Commission expires: 3/3/51.

[Endorsed]: Filed June 29, 1950. U.S.C.A.

Mr. Renfrew: I would be willing to waive the
reading of that if you wish to read it in argument or
at [72] another time.

Mr. Kay: That is fine. I will waive.

The Court: Do you have any cross-examination?

Mr. Renfrew: No, Your Honor.

(Witness excused.)

Mr. Kay: Call Mr. Easley.

OLIVER J. EASLEY

being called as a witness on behalf of the plaintiff,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Would you state your name please, Mr.
Easley?

A. Oliver J. Easley, E-a-s-l-e-y.

Q. Where do you live, sir?

A. 115 East Eleventh, Anchorage.

(Testimony of Oliver J. Easley.)

Q. How long have you been a resident of Anchorage, Mr. Easley?

A. Been a resident about two years and was on the base about two and one-half.

Q. May I ask what your occupation is?

A. Toolroom supervisor, Alaskan General Depot.

Q. Are you acquainted with Mr. Lawrence White, the defendant, sitting over at the table?

A. I have a speaking acquaintance with him.

Q. And you are acquainted with Mr. Carl Rentschler [73] sitting here at the plaintiff's table?

A. Yes, I am.

Q. Did you know Mr. White in the month of April, 1949? A. Yes, I did.

Q. Did you have occasion to have any conversation with Mr. White during that month?

A. Yes.

Q. Could you fix the time and the place and so far as possible give us the persons present at the time of this conversation?

A. Well, the time was in the last week in April and it was in the Alaska Railroad freight depot in the office.

Q. Any one else present besides yourself and Mr. White?

A. There are a lot of people there, clerks, but I don't believe there were any witnesses to our conversation.

Q. Would you tell the jury, please, just what

(Testimony of Oliver J. Easley.)

this conversation consisted of—what Mr. White said to you, what you said to him and so on and so forth?

A. We were waiting to pick up some freight, myself for the concern for which I work and it took quite a bit of time and we got in conversation with each other and I knew that he had been——

Mr. Renfrew: Now, I object, Your Honor. Maybe I can't object that it is not responsive to the question but [74] I can certainly object that it is irrelevant and immaterial.

The Court: Yes, you can object on other grounds.

Mr. Renfrew: Well, I do so object.

The Court: You mean what he was about to say?

Mr. Renfrew: He is giving his impressions, his opinions which are not proper.

The Court: Just relate the conversation without your opinions and try to refrain from stating what your impression was or about anything leading up to it.

The Witness: I see. I asked Mr. White if he were selling the L. & W. Candy Shop and he stated that he told me the man's name which I don't recall. I don't recall the man's name. I asked him if that was the man I had seen working in the L. & W. the past week or so and he said, "Yes, that was the man."

He said he was just down there picking up some machinery; I believe it was an ice cream machine or something and helping out the new owner temporarily until he got acquainted with the business.

(Testimony of Oliver J. Easley.)

That was just about the extent of our conversation.

Q. And about when did that conversation take place?

A. Well, it was some time in the last week in April.

Mr. Kay: That is all. [75]

Cross-Examination

By Mr. Renfrew:

Q. Mr. Easley, how long had you known Mr. White, did you say?

A. Well, I had been a customer in the L. & W. for a period of two or three years, in and out, and I knew who he was and I had talked to him at different times.

Q. A customer? You mean you went in there and bought a cup of coffee or a milk shake or something of that nature?

A. That is correct.

Q. Over a period of time you have done that, you say?

A. Yes.

Q. Have you ever visited in his home?

A. No, sir.

Q. Are you a married man?

A. I am.

Q. Were you at that time?

A. I was.

Q. Were you acquainted with Mrs. White?

A. No, I don't know her.

Q. Did Mr. White know Mrs. Easley?

A. No.

Q. Do you belong to any organizations where you attended together or anything like that?

(Testimony of Oliver J. Easley.)

A. Not that I know of. [76]

Q. Did you ever see him outside of the place of business? A. From time to time, yes.

Q. Just on the street? A. Yes.

Q. Just to speak to? A. That is right.

Q. Your acquaintance, then, consisted of your knowledge that he was the owner or operator of the L. & W. Chocolate Shop and you were a customer?

A. That is correct.

Q. And that is the only relationship that you have ever had with him? A. That is right.

Q. And other than seeing him on the street to speak to you never had any conversation with him other than what you have like in the barber shop or something like that? A. That is correct.

Q. Now, on this conversation that you had in the Alaska Freight depot, did you say? A. Yes.

Q. I believe you stated that the conversation went something like this: I asked White if he was selling the L. & W.? A. That is right.

Q. You knew him well enough, did you, to inquire into [77] whether or not he was disposing of his place of business?

A. I had been around the L. & W. in the past week as a customer, used to go there all the time, heard a conversation—it appeared to be common knowledge. I was curious and asked him.

Q. In other words, you had heard someplace before that he was selling the L. & W.?

A. Yes, I had.

(Testimony of Oliver J. Easley.)

Q. And in the past week you had heard that?

A. That is correct.

Q. And so you are curious, your curiosity was aroused, and you waited until you saw him in the freight sheds and then you asked him down there and he said, "Yes, I have sold the place."

A. I didn't wait to ask him. I was merely passing the time of day.

Q. When you had seen him in the L. & W. you didn't ask him there?

A. I didn't hear it there.

Q. I misunderstood you. I thought you said you had been there and it was common knowledge down there.

A. It was in that block among the business men.

Q. You had heard it someplace else?

A. Yes, I had, yes.

Q. Where had you heard it? [78]

A. I worked for Leonard Hopkins at the time. I heard it there.

Q. You heard it over at Leonard Hopkins?

A. That is right.

Q. What had you heard, that he had sold it or he was selling it or White was selling out or what?

A. I just heard that he was selling it.

Q. That he was selling it? A. Yes.

Q. You say you are acquainted with Mr. Rent-schler? A. I am.

Q. How long have you known him?

A. About four years.

(Testimony of Oliver J. Easley.)

Q. And have you discussed this matter with him, have you?

A. Mentioned and discussed it a little bit some-time ago, not recently.

Q. Were you and he buddies in the army or something?

A. We were assigned to the same unit.

Q. How did you happen to talk with him about it that first time?

A. It was the same night that I had had the same conversation during the day with Mr. White and I knew that Mr. Rentschler had the listing for the L. & W.

Q. You knew about Mr. Rentschler's business, too, then? [79]

A. I knew that he had the listing for the L. & W., yes.

Q. Have you been in the courtroom today?

A. No, sir.

Q. You haven't been in here today?

A. Well, just when I came in just before recess.

Q. You didn't hear Mr. Rentschler's testimony?

A. No, sir.

Q. Did he tell you that he had the listing on that?

A. At the time he had the listing, yes.

Q. When was that?

A. I should imagine it was somewhere in the early part of April.

Q. Did he tell you that it was a confidential listing and that he was having difficulty disposing

(Testimony of Oliver J. Easley.)

of it because he wasn't supposed to tell anybody about it excepting the purchasers?

A. We didn't discuss it that much.

Q. He just told you. How friendly were you with Mr. Rentschler up to that time?

A. We have been good friends.

Q. Have you visited in his home? A. Yes.

Q. And he visited in yours? A. Yes.

Q. And you talk over your business probably together, [80] do you? A. Sometimes.

Q. And in this case he told you about his having the listing on the L. & W. Chocolate Shop?

A. He did.

Q. Did he tell you anything to the effect that White was trying to beat him out of his commission?

A. No, he did not.

Q. No mention made of anything like that?

A. (No response.)

Q. How did you happen to tell him about it that night that you heard the L. & W. had been sold?

A. Because from the thing that he had told me how long his listing was—in fact, he mentioned that he had a client who was going to buy it and I assumed that when Mr. White told me that he had sold the place that Carl Rentschler had made the sale for it.

Q. You didn't ask Mr. White if that was so?

A. I didn't know anything about it.

Q. Oh, you talked with Mr. White earlier in the day before you talked to Mr. Rentschler. That is why you told Rentschler about it that night?

(Testimony of Oliver J. Easley.)

A. That is correct. I didn't tell him about it. I congratulated him on making the sale.

Q. I see. You didn't ask Mr. White if Mr. Rentschler [81] had sold the property?

A. No.

Q. Now you say that Rentschler had already told you that he had a prospect for it and he figured he was going to be able to sell it? A. Yes.

Q. Did he tell you who the prospect was?

A. No.

Q. Didn't tell you his name? A. No.

Q. Do you remember when you had that conversation with him?

A. I couldn't recall exactly, no. Probably a week before the time before I talked to Mr. White.

Q. Mr. Easley, you of course know that I am going to ask you how you place this on the last week in April, but I would like to have you give me a good answer to that.

I know you have had plenty of time to think about it.

Mr. Kay: I will ask that that remark be stricken.

Mr. Renfrew: I will withdraw it and apologize.

The Court: The jury is instructed to disregard it.

Q. (By Mr. Renfrew): Why do you place it the last week in April?

A. I place it due to the fact that I knew that the [82] listing ran out right near the last of April, and I believe on the last day as I recall and I remarked to myself at the time that Carl must have

(Testimony of Oliver J. Easley.)

sold the property due to the fact that the listing was still good.

Q. How did you know the listing ran out on the last day of April?

A. Because Mr. Rentschler told me so.

Q. Mr. Rentschler told you sometime in the forepart of April that he had a chance to sell the L. & W. Chocolate Shop but that the listing ran out the last day of April, is that correct?

A. That is correct.

Q. Did he tell you that he also had a chance to sell something else over here and when the listing ran out?

A. No.

Q. The only discussion was about the L. & W. Chocolate Shop?

A. That is right.

Q. And that is the only thing that he told you he had any listing on?

A. That is right.

Q. And the only one he told you when the listing ran out?

A. That is right.

Q. And how long had he been in the real estate business [83] here?

A. Well, since he returned to the States after being separated from the Air Force. I think it was probably about a year or so.

Q. And you had been here during that period of time?

A. Yes.

Q. And visited with your friend?

A. I did.

Q. And yet the only listing he ever told you about is this one?

(Testimony of Oliver J. Easley.)

A. Not the only one he ever told me about. It was the only one I knew about at the time.

Q. And immediately after you had the conversation with Mr. White you thought, "Oh, oh, Rentschler has made himself some money."?

A. That is what I thought, yes.

Q. Because he told you that his listing ran out on the 30th?

A. That is correct. I assumed his listing was still good and that he had made some money on it.

Q. That impressed you to that extent? How much time did he have after that conversation that you had with Mr. White? What day was it? Was it the 29th?

A. I can't place the exact date. I know it was in the last week in April and as I recall I believe it was [84] on a Thursday.

Q. The last week in April. Why do you fix it at Thursday?

A. Because I had to work that night late. That was my regular night to have to work late in the store.

Q. This impressed you now to the extent that you can recall that you had to work that night late?

A. That is right.

Q. When did you see Rentschler?

A. After I got off work that night and went home.

Q. Did you go to his house?

A. We live next door to each other.

Q. Still, did you go to his house?

(Testimony of Oliver J. Easley.)

A. I don't recall whether I was over to his house or whether he was over to mine.

Q. What time did you get off work late that night? A. Nine o'clock.

Q. Either you went to visit him or he came to visit you? A. That is right.

Q. Do you frequently visit next door?

A. Possibly a couple of times a week.

Q. Yet you can positively remember that this was the last week in April? A. I do. [85]

Q. And you feel certain that it was on Thursday because Thursday was the night that you had to work late? A. That is right.

Q. You worked every Thursday night late, did you? A. I did, yes.

Q. Have you had occasion to look up the date of Thursday the last week in April? A. No, sir.

Q. You haven't checked that? A. No.

Mr. Renfrew: I think that is all, Mr. Easley.

Mr. Kay: That is all, Mr. Easley.

Mr. Kay: I will call Mrs. Eagleson.

CLARA M. EAGLESON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Would you state your name, please, Mrs. Eagleson? A. Clara M. Eagleson.

(Testimony of Clara M. Eagleson.)

Q. And what is your occupation, Mrs. Eagleson?

A. Real estate broker.

Q. Are you duly licensed as a real estate broker in the Territory of Alaska? A. I am. [86]

Q. And how long have you been such, Mrs. Eagleson, if you know?

A. I have been licensed since 1947.

Q. Do you recall, Mrs. Eagleson, a listing in your office of the L. and W. Chocolate Shop?

A. Yes, Carl Rentschler, who became associated with me in June of 1948, took the listing but Mr. White had prior talked to me about it before I moved down to my present location.

Q. Where was your office at that time, Mrs. Eagleson?

A. In the Anchor Book Shop on "H" Street, which is in the Harbor Building.

Q. Did you say that you had a conversation with Mr. White at about that time?

A. Yes, he had discussed with me placing his—selling his place. Just business conversations. I went in for lunch every day and several times we engaged in conversation.

Mr. Renfrew: I object to any further testifying on the ground that it is incompetent, irrelevant and immaterial. The contract has been introduced.

Q. (By Mr. Kay): Did your conversations result in the contract which has been introduced in evidence?

A. I wouldn't say that my conversations resulted

(Testimony of Clara M. Eagleson.)

in the contract being signed. He contacted Mr. Rentschler. [87]

Mr. Renfrew: I object to any of this now as hearsay.

The Court: The last part of her answer was not hearsay.

Mr. Renfrew: I beg your pardon.

The Court: There is no part of the answer that is hearsay.

Mr. Renfrew: Did she know that he contacted so and so and did such and such? Was she there?

The Court: When she says that he did the presumption is that she knows of her own knowledge.

Mr. Renfrew: I object to it on the grounds that she didn't state that she knew it of her own knowledge.

The Court: A witness can't do that with each and every question. Objection is overruled. You have adequate protection by cross examination.

Mr. Renfrew: All right.

Q. (By Mr. Kay): As a result of all this whatever-it-was, did you obtain a listing of the L. W. Chocolate Shop? A. Yes, sir.

Q. And is that in accordance with the contract previously introduced in evidence by Mr. Rentschler? A. Yes, sir.

Q. What, if anything, Mrs. Eagleson, did you do about selling the L. W. Chocolate Shop? [88]

A. Well, it is customary when——

Mr. Renfrew: I object to what is customary as an opinion and a conclusion of this witness.

(Testimony of Clara M. Eagleson.)

Mr. Kay: Well, he doesn't know but what she is going to say that it is customary to do exactly what I did.

Why don't you wait until she answers?

The Court: I think the objection will have to be overruled on other grounds and that is that she may testify to a custom of the business if it is so well known that the defendant himself would be presumed to know it.

Mr. Renfrew: What was that theory, your Honor; I didn't follow it.

The Court: It is not a theory; it is a law. There is a custom in the real estate business of such a kind that the defendant would be presumed to know about it and was ignorant of the contract.

I don't know whether she was going to testify to anything like that.

Mr. Renfrew: Would the Court want me to wait until after she has answered the question and then strike it?

The Court: You might wait until after the answer has been completed.

The Witness: It is customary when property is listed in our office that we proceed immediately with advertising. Mr. White requested at the time of listing, [89] when he signed with Mr. Rentschler, our representative, that he did not want it advertised in a manner that it could be identified as the L. & W. Coffee Shop. That is what we did.

We also agreed that there would be outside advertising and we advertised in the Seattle P.I., the

(Testimony of Clara M. Eagleson.)

Seattle Post Intelligencer is the proper name. Mr. Eagleson, my husband, was outside at the time and took the calls and interviews of the answers that were made through the Seattle Post-Intelligencer through the Hotel Fry in Seattle.

Mr. Renfrew: Now if *the* please the Court, I wish to interpose an objection on a reply made by the witness that the answer obviously is based on hearsay. She stated that her husband was outside and did certain things which I assume that she couldn't have been there to have heard.

The Court: Well, even if she had been there, it just seems to me that it is perhaps immaterial. The only point here as I see it is whether the plaintiff procured a purchaser and it seems to me these details are immaterial, unless you claim some relevance for them that isn't apparent.

Mr. Kay: I claim it is relevant, your Honor, to show what was done, under this listing. This contract does not require her to procure a purchaser.

The Court: But you are not suing for services you are suing for the commission. [90]

Mr. Kay: But in order to establish the validity of that contract it is proper to show the consideration which was exchanged for it and the consideration was the amount of things that she did to sell the place and the things that the agent did.

Mr. Renfrew: Is the validity of the contract in question here? We admitted it.

The Court: When a purchaser has been procured

(Testimony of Clara M. Eagleson.)

as you allege then the services, the intermediate services are not material here. In other words, you don't have to show consideration if there has been a procurement of a purchaser.

I don't want to unduly hamper you on any theory that you have. I am just suggesting that as a means of shortening the case. Unless you anticipate that they are vital to your case.

Mr. Kay: I don't believe it is vital but I think it would be helpful if she was merely allowed to state—which would take about one minute, the amount of money that she paid in advertising the L. & W. Coffee Shop both in Seattle P.I. and the Los Angeles papers and radio.

The Court: She may state in a general way, then.

Q. (By Mr. Kay): Mrs. Eagleson, in accordance with this listing——

Mr. Renfrew: What happened to my objection about the [91] hearsay? Are we going to strike that now?

Mr. Kay: I have withdrawn the question.

Mr. Renfrew: It has already been stated and answered and now he wants to withdraw it.

The Court: As I stated the answer was not hearsay on its face. It might be open to that interpretation but we can't make an independent exploration of each question or lay a foundation for each question first because it is presumed that it is not going to be hearsay. Of course, as I said before, you have adequate protection by cross examination. Go ahead.

(Testimony of Clara M. Eagleson.)

Q. (By Mr. Kay): Mrs. Eagleson, will you state approximately the amount of money which you and your agent expended in advertising the L. W. Chocolate Shop, both in Seattle and in Anchorage?

Mr. Renfrew: One moment. I wish to interpose an objection for the purpose of the record, that the answer to that question is irrelevant and immaterial and that is our theory of the case, your Honor.

The Court: Well, having already ruled on it—I said she may show that in a general way and not go into detail.

The Witness: The amount was between \$600 and \$700.

Q. (By Mr. Kay): You heard Mr. Rentschler's testimony concerning the prospects which he took down to the place? [92]

A. Yes, sir.

Q. Did you take any other prospects, or was he the only one who took prospects?

A. No, I don't. That was Mr. Rentschler's part of the work. I interviewed them in the office and try to process them and see if they are capable of buying if properly interested.

Q. Now, in the month of April, 1949, Mrs. Eagleson, did you have any conversations with Mr. White concerning the transaction?

A. Yes, I did.

Q. Could you state the approximate time and

(Testimony of Clara M. Eagleson.)

place of your first conversation with Mr. White during that month?

A. It was, I am quite sure, the 23rd of April.

Q. And where did the conversation take place, Mrs. Eagleson?

A. In my office. I asked him to come down by phone request.

Q. And was anyone else present in the office during the conversation?

A. No, I asked Mr. White to come down to my private office and we then engaged in conversation there.

Q. What did Mr. White say to you and what did you say to Mr. White during that conversation?

A. I told him that I had heard that he had sold and he [93] denied it and I told him then that I was positive that he had sold.

Q. Did you tell him how you were positive? What did you say to him? A. Pardon?

Q. Would you say if you told him how you knew?

A. I overheard him tell someone that he had sold and also Mr. Fred Neider.

Q. Did you tell him that?

A. Yes, and he said it was peculiar that people know more about my business than I do, so we went on and I told him that he was liable for the commission and he wanted to know the reason—I fixed this quite firmly as the reason—he thought he gave Carl a twenty-day extension which would bring it up to the 28th. The 23rd was five days

(Testimony of Clara M. Eagleson.)

prior to what he thought his final listing date was. It was up to and including the 30th day of April.

He told me that he had such a low bid from Mr. Pickering that he just couldn't pay a commission and accept the offer of \$30,000 and he went into his private affairs, into how tragic it was that he had to sell, that it was causing trouble; that his wife was going to leave him; that they were getting in each other's hair.

I said let me talk to Mr. Pickering and let me see if we can include him to commit himself to a price that will [94] allow for the commission which I agreed to take to help the deal out and Mr. White replied, "No, no, no, Pickering won't have anything to do with an agent. He is allergic to them."

So, I told him, "Well, if you will get him up to the price you want I agree to take \$2,000." He was very happy about it and he said he would pay it.

The deal went through and Mr. White did not come to see me and Mr. Rentschler went and told him that I would like to see him and he sent word back to me if I wanted anything out of him——

Mr. Renfrew: Your Honor——

Mr. Kay: You can't testify to what Mr. White said. Just say if some conversation was had and what happened as a result of that conversation.

The Witness: Mr. White said, "My information was that if I——

Mr. Renfrew: Just a minute.

Mr. Kay: Not "your information"——

(Testimony of Clara M. Eagleson.)

Mr. Renfrew: Can I make an objection or do I have any standing here at all? I can appreciate counsel's——

Mr. Kay: I am just trying to do exactly what you want done.

The Court: I don't see—There isn't anything before the Court now. He hasn't asked any question objectionable [95] in form that I know of. Now if you wish to make an objection at this time to something you will have to specify because I don't know what it is you are objecting——

Mr. Renfrew: I tried three times, your Honor, to make an objection and I have been interrupted by counsel.

The Court: But counsel stopped her himself from beginning hearsay.

Mr. Kay: If Mr. Renfrew would stop harrassing me in the examination of my witness and do his job when he gets to it maybe we will get along a little better here.

Mr. Renfrew: If those are your sentiments I will.

Mr. Kay: Those are my sentiments.

Q. (By Mr. Kay): As a result of something happening did you contact Mr. White again?

A. Mr. White replied if I wanted anything out of him that I would have to get it before the next morning.

Mr. Renfrew: We object to that answer.

Mr. Kay: Well——

Mr. Renfrew: That is what I have reference

(Testimony of Clara M. Eagleson.)

to, your Honor. I start to make an objection and then counsel interrupts.

The Court: But the Court always permits you to make the objection. Go ahead.

Mr. Renfrew: Thank you, your Honor. I object to [96] the reply that was made by the witness and ask that it be stricken. The preceding question shows that someone told her. I objected to that. Now counsel states you can't tell——

The Court: The presumption is, then that she is testifying from personal knowledge. That doesn't sound like it is within her knowledge.

Mr. Kay: I will just ask the question and bring it out.

Q. (By Mr. Kay): Did you see Mr. White again after this?

A. No, Mr. Rentschler was the representative.

Q. You didn't see Mr. White again?

A. No.

Mr. Renfrew: That doesn't bring out anything.

Mr. Kay: It brings out——

The Court: Well, he stopped from asking for hearsay; now you can't very well complain——

Mr. Renfrew: Do I understand, your Honor, that the jury knows now that they should not consider that testimony which she just made because it is hearsay? Do I understand that the jury knows that?

The Court: I don't know whether they will know it or not, but your objection just a minute ago now was to his question and not to her answer,

(Testimony of Clara M. Eagleson.)

and I have stated [97] that you have to be specific with your objections or the Court will not understand.

Now, if you object to her answer, that it is hearsay, I assume that from what counsel himself says that he concedes that it is hearsay.

Mr. Kay: I will concede that it may be stricken.

Mr. Renfrew: Your Honor, my objection was that it was hearsay and I ask that it be stricken.

Mr. Kay: And I will stipulate that it may be.

Mr. Renfrew: Thank you. Now we are down to where we got the ruling that I think I was entitled to, where he admits that it is hearsay if it——

The Court: You understand my ruling is this: When the question does not count for hearsay and when the answer is in such form that it doesn't appear to be hearsay, then it is not open to any objection that it is hearsay even though it might be hearsay.

It may develop on cross examination that it is hearsay but at this stage of the case I can't have it stricken out or strike it out as hearsay because it would be assuming that it is hearsay unless somebody concedes it is and that is the situation here in connection with his last question and answer.

Now we have to understand each other that if the question is not in such form that it calls for hearsay and if [98] the answer is not in such form that it shows it is hearsay, it is not open to objection.

(Testimony of Clara M. Eagleson.)

Mr. Renfrew: I concede that to be the rule, your Honor, and I apologize if the Court thought I was doing anything to the contrary but I think that both your Honor and Mr. Kay will concede that the preceding questions and answers that that answer had to be hearsay because she said that she was told that and not by Mr. White.

Now certainly I don't have to wait until cross examination to ask her again whether Mr. White told her that. The two preceding questions clearly show that it was hearsay so I ask that it be——

The Court: The ruling of the Court is that unless the form of the question that it calls for hearsay or unless the answer is such that it appears to be hearsay that you have to wait until cross examination.

Mr. Renfrew: Even though the preceding questions show that it is clearly a hearsay question?

The Court: I am not stating that it was the situation here. Go ahead.

Q. (By Mr. Kay): Now, then, Mrs. Eagleson, the conversation that you have testified to is the only conversation which you had with Mr. White during the month of April, to the best of your recollection? [99]

A. Yes, in which he agreed to pay a certain commission.

Mr. Kay: I think that is all.

(Testimony of Clara M. Eagleson.)

Cross Examination

By Mr. Renfrew:

Q. You stated, Mrs. Eagleson, on the direct examination that you had spent between \$600 and \$700 in the advertising the property concerned?

A. Uh huh.

Q. Did you spend that money on the original contract that you took in July of 1948 for 60 days; is that when you spent that money?

A. Mr. Renfrew——

Q. Can you answer the question yes or no, Mrs. Eagleson?

Mr. Kay: She doesn't have to answer a question yes or no. She can explain it, can't she?

The Court: If he asks her if she spent it during a certain period there is no reason why she can't answer it.

The Witness: No, not within the first 60 days.

Q. (By Mr. Renfrew): How much of the \$600 or \$700 did you spend when you had the original listing in the first 60 days?

A. I can't say right to the penny how much it was but it was in the vicinity of \$400.

Q. In the vicinity of \$400?

A. Uh huh. [100]

Q. Then you received no prospects on the original listing, did you? That is, you did not make any offer of sale to Mr. White on the original listing?

A. We had no one wanting to put up money.

Q. All right.

(Testimony of Clara M. Eagleson.)

A. Many prospects but no one wanting to put up money at that time.

Q. So you had no opportunity to sell it?

A. No, I would say not.

Q. I will ask you, in the usual course of real estate business where you take an exclusive listing, as you say you had on this, is that your general way of doing business where you advertise the property, when you sell it you get back your money and the commission, and if you don't sell it it is the cost of doing business? A. Uh huh.

Q. If you spent up to \$400 on the original listing, when did you spend the difference between that and \$700 or \$600 which would either be two or three hundred, when was that spent?

A. After our listing had expired. Mr. White—we had conversations off and on. They were more like friendly conversations, in which he said that he still wanted to sell and he said, “Keep plugging” and we did. I was——

Q. Mrs. Eagleson, I am constrained to stop you. I [101] don't want to clutter up this business. I asked you when you had spent the other two hundred or three hundred dollars?

A. Sometime between the expiration of the listing and the expiration of the extension.

Q. Well, how much would you say that you spent from the time that you received the extension which I believe was on the 8th of April, until the end of April—the 30th of April?

A. Approximately one hundred dollars, which

(Testimony of Clara M. Eagleson.)

was mostly done by—I think the biggest part of the expense was radio.

Q. And may I ask where that radio advertising took place?

A. I could be mistaken on that without reviewing my records, Mr. Renfrew, but if it was over the radio it was KFQD.

Q. And your radio programs were not limited to one piece of property?

A. We didn't have very much time to talk. You couldn't put very many of them on.

Q. The question I asked you was whether or not your radio program in the morning when you advertise over the radio, was that limited to one piece of property?

A. On a large listing it had to be. Time didn't permit anything else. [102]

Q. Is it your testimony, then, that you spent one hundred dollars in the month of April attempting to sell the Lounsbury and White Candy Shop? I ask the question, Mrs. Eagleson. Did you do that—spend one hundred dollars in the month of April by radio advertising for the sale of this property—only this property?

A. I won't say it was all radio. I think the biggest part of it was radio. There was some paper advertising. We couldn't identify it. Mr. White didn't want us to identify it as the L. & W. Shop.

Q. In general what you did was advertise for buyers of businesses and so forth, isn't that true?

A. No, the place was described and the approx-

(Testimony of Clara M. Eagleson.)

imate return on your investment was gone into so as to interest people with that kind of money. You don't have very many of them, you know.

Q. You have talked this matter over with Mr. Rentschler when he went to get the extension?

A. Mr. Rentschler never did anything without discussing it with me first.

Q. Did you talk this matter over with Mr. Rentschler?

A. Certainly. Every dealer in my office talks with me first.

Q. All right. Thank you. Now, in this deal, did you understand that Mr. Rentschler had the number of prospects [103] that he had been working on and that is why he went to get the extension?

A. Yes, I knew every one of them.

Q. If he had all those prospects was it after they had petered out so to speak, that you continued to spend more money on advertising?

A. No, right up to the last day we still had people interested but they could not put down any more money than Mr. Pickering.

Q. Did you have an offer from anyone to buy these premises at any price?

A. We had an offer. He had \$4000 with him. He would have put up more but he couldn't get to first base for less than \$40,000.

Q. Did you have any offer or convey any offer that you had for the sale of these premises to Mr. White or Mrs. White?

A. I never talked with Mrs. White in my life.

(Testimony of Clara M. Eagleson.)

Q. Did you ever talk to Mr. White about any offer that you had?

A. Uh huh. I told him that we had this off offer. He said, "I can't take it. I need more money."

Q. When was that and who did you have the offer from?

A. A man by the name of Uran, I think his name is [104] pronounced.

Q. Uran? A. Uh huh.

Q. U-r-a-n?

A. I think that is the way you spell it.

Q. And he offered you \$40,000?

A. No, he did not. He said he wouldn't pay \$40,000 and that is the best we could get out of White.

Q. What offer did he make?

A. By the time he got around figuring it over to make another offer, Mr. White had sold to Mr. Pickering.

Q. Did you ever tell Mr. White that Mr. Uran had made an offer for his premises?

A. Yes, I did. Let me answer. I told him that we had this offer of \$4000 but he didn't think it was worth \$40,000.

Q. In other words, it is my understanding now that you told Mr. White, "We have a buyer for \$4,000."

A. He had 4000 down and he said he could get more in a limited time but that was all he had with him at that time and Mr. White said, "No, I can't

(Testimony of Clara M. Eagleson.)

take it" and then Mr. Uran wouldn't go \$40,000 and Mr. White didn't want to come down under \$40,000, otherwise he would sell to Pickering.

Q. Did you ever discuss with Mr. White what Mr. Uran [105] was willing to pay along on a monthly-payment plan?

A. Mr. White never committed himself further.

Q. Mrs. Eagleson, may I caution you, if you will please answer the questions that I ask you without going into so much detail. I think then we can talk more slowly and perhaps unencumber the record.

A. All right.

Q. My question is a very simple one. Did you ever at any time advise either Mr. White or Mrs. White that you had a buyer for their premises who was willing to pay a specific amount of money?

A. Yes. When Mr. White was in my office on the 23rd——

Q. All right. On that date what did you advise Mr. White?

A. I didn't advise him anything. I just told him what I had and he told me, "I can't take it. I have to have more money."

Q. Evidently you misunderstood, Mrs. Eagleson, I am trying to be so careful with you. What did you advise Mr. White as to the actual price that Mr. Uran would be willing to pay then for his business?

A. Mr. Uran would not state a final offer. He told me to ask Mr. White his best price but he said—Mr. Uran said—"I will not go \$40,000." I

(Testimony of Clara M. Eagleson.)

Q. Did you ever talk to Mr. White about any offer that you had?

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(Testimony of Clara M. Eagleson.)

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A. Mr. Uran would not state a final offer. He told me to ask Mr. White his best price but he said—Mr. Uran said—"I will not go \$40,000." I

(Testimony of Clara M. Eagleson.)

asked Mr. White what his lowest price would be under the circumstances and he [106] said, "I cannot take it because I can not take that small down payment" and it stayed there.

Q. That was on the 23rd? A. 23rd, yes.

Q. That was the same date that you had the conversation which you have previously mentioned when you called Mr. White and had him come in as you had understood that the business had been sold? A. That is right.

Q. And did you not state on direct examination that you stated to him, "I understand you have sold your place"? A. Yes.

Q. And he at that time stated to you, "I have not sold my place," isn't that true?

A. No, he didn't say it that way. First he denied it and he said people knew more about his business than he did about it himself.

Q. Yes?

A. And I said I am very positive that you have sold your place to Mr. Pickering and then he told me that it wasn't paying enough money and he couldn't and I said you are liable for the commission——

Q. Mrs. Eagleson, let's try now to confine our answers if we can to just the questions which I ask you. My next question is as follows: Did Mr. Uran or any other prospect [107] whom either you or any of your agents were able to interest in the purchase of Mr. White's business, ever make any

(Testimony of Clara M. Eagleson.)

concrete offer to you as to what they would be willing to give for the business?

A. Mr. Uran was the only one who made an offer as near complete as I quoted in the last question.

Q. Did Mr. Uran ever make any concrete offer as to an amount of money that he would be willing to pay for the White Candy Shop?

A. No, he asked Mr. White to set the price.

Q. Now, just a moment. I am asking you just whether or not he ever made any concrete offer to you or in your presence to Mr. White of an amount of money that he would pay for the business?

A. No.

Q. Now, were you personally acquainted with Mr. Pickering? A. No.

Q. Did you only find out that Mr. Pickering was interested in the purchase of this business through either some third party or Mr. White himself? A. Mr. White.

Q. Mr. White himself? A. Yes.

Q. Did you know at that time that he was an employee of Mr. White's? [108]

A. No, I didn't know anything about it at all.

Q. You made no contact with Mr. Pickering?

A. I contacted Mr. White first and he told me not to.

Q. The question was, did you make any contact with Mr. Pickering? A. No.

Q. Now, on your direct examination you made some statement in substance that a new deal was

(Testimony of Clara M. Eagleson.)

made between yourself and Mr. White on the 23rd of April in which it was agreed that he would pay you a commission of \$2,000 if the sale went up. Now can you explain what you meant by that—slowly if you will, please, so that the court reporter will get your answer.

A. Well, I don't think you could call it a new deal, Mr. Renfrew. When Mr. White admitted that he was accepting and contemplating taking Mr. Pickering as a purchaser, he said, "I cannot afford to take the price that he is offering me of \$30,000 and pay a commission." And I said, "Let me get—Let's talk together and we surely—Mr. Pickering would be willing to pay \$35,000 and I agreed.

We had always been friendly with Mr. White and he told me of his troubles and——

Q. Just a moment, you are getting clear off the subject. You are not replying to the question.

A. All right. So, he said he would try to bring him [109] up above \$30,000 and the agreement was he was to pay me \$2,000 upon the reduced price of sale to Mr. Pickering over and above, if he could get him up over \$30,000——

Q. Was there anything said about when he would pay you \$2,000 if he was able to get the price above \$30,000?

A. No, the general assumption is those things are paid when they are——

Q. Was there anything said about when he would pay you the \$2,000? That was my question.

(Testimony of Clara M. Eagleson.)

A. Not to my knowledge, not an exact date mentioned.

Q. Did you take it from that conversation that even if he did not sell to Mr. Pickering until the Fourth of July that you would still be entitled to get a commission?

Mr. Kay: I object to that as irrelevant.

The Witness: I didn't state that.

Q. (By Mr. Renfrew): I asked you if that was your impression?

A. Depending on the contract. I expect the contract to be lived up to. I had lived up to it and I expected him to.

Q. Did you have any understanding as to when the sale would be made with Mr. Pickering? In other words, was that agreement between you and Mr. White good for after your extension which expired according to the evidence here on the 30th day of April? [110]

A. There was no date mentioned. He expected to close the deal, he said, on or before the first. He said that our extension expired on the 28th which it didn't; it went to the 21st of May and I wrote him out the listing and showed it to him.

Q. Then was it your understanding in that conversation that in the event he sold before the listing was up, to Mr. Pickering, that you were to receive a commission, but that if he sold after the listing you were not to receive a commission?

A. That never entered into the conversation. The only conversation on that score was that if Mr.

(Testimony of Clara M. Eagleson.)

Pickering paid more than \$30,000 that he was to pay a commission of \$2,000.

Q. Was that new agreement, that you have just related now, which you made with Mr. White, did that agreement extend your option of the exclusive sale of the property after the 30th day of April?

A. No, there was no further date made other than that he had sold the property. He told me so.

Q. Do I understand that he told you that he had the property sold? A. Yes.

Q. And that you suggested to him then, "Let me talk to Mr. Pickering and maybe even though you have already [111] sold it to him for \$30,000, I can make him pay \$32,000"?

A. No, it wasn't in that vein at all, Mr. Renfrew; he said he wanted us to get the price up if we could, which, of course, we hadn't been able to do so he said, "I will have to take the offer that he has given me because I have to go through with it." But he said, "I can't afford to pay a commission when I only sell for \$30,000" and I said, "In that event you will have to pay the commission you have contracted for" and he said——

Q. Do I understand your testimony, Mrs. Eagleson, to be that Mr. White told you "I have sold this property for \$30,000 but if I can by some strange way get the purchaser now after I have sold it to him for \$30,000, to make it \$32,000, I will give you \$2,000?"

A. No, that wasn't the wording. His offer from Mr. Pickering was \$30,000. The papers had not

(Testimony of Clara M. Eagleson.)

been signed. They were waiting for the listing to expire. They thought it was the 28th. Mr. White admitted all that and I brought out the listing and showed him that it wasn't, that it ran until the first.

Q. Then it was your understanding that the papers have not been signed as yet and that the deal had not been closed instead of the contrary, is that your——

A. I inferred that much because he said that he couldn't afford to pay on \$30,000 but if he could get him [112] up beyond \$30,000 he would be able to pay the commission.

Q. As a matter of fact, Mrs. Eagleson, he told you that the papers had not been signed?

A. No, he didn't say that exactly. He inferred as much.

Q. Didn't you just state that he said, "These papers have not been signed and we are waiting until the option expires?"

A. No, I said that the purpose was—that I thought the purpose was to wait until the option had expired.

Q. Did he state that the papers had been signed?

A. No.

Q. May I ask why you mentioned a moment ago that the papers had not been signed?

Q. I didn't say they hadn't been signed.

Q. Well, did he or did he not tell you that he had sold this place of business for \$30,000?

A. He told me that he had entertained the offer

(Testimony of Clara M. Eagleson.)

from Mr. Pickering of \$30,000 which he would be obligated to take if he didn't get a better offer.

Q. Then you did not infer from that that he had sold the property to Mr. Pickering?

A. Yes, I did.

Q. You mean even when he told you that he would have to take Mr. Pickering's offer if he didn't get a better one [113] was tantamount to telling you that he had sold it to Mr. Pickering?

A. I didn't take what Mr. White said as gospel truth about the transaction because the man was in possession of the place.

Q. What man, do you refer to?

A. Mr. Pickering.

Q. Wasn't it true that Mr. White was there also?

A. Yes, he was and he told me, too, "I am teaching him the business as I agreed to teach anyone who would purchase my place" which he did.

Q. Now, I will ask you, Mrs. Eagleson, whether during your option agreement as the exclusive agent of this property which, according to the record signed July 8th and the extension which you received on the contract which was up on the 30th of April, 1949, did you at any time ever state to Mr. White any concrete offer of any purchaser for the sale of the Lounsbury-White Candy Shop?

A. I answered that several times and the answer was "No."

(Testimony of Clara M. Eagleson.)

Q. I will ask you, your option, I believe called for the sale at \$45,000? A. Right.

Q. And you never at any time were able to secure a purchaser at that price?

A. That is right. [114]

Mr. Renfrew: May I have the original file for just one moment?

Q. Mrs. Eagleson, I hand you the complaint in this case and ask you if that is your signature?

A. Yes.

Q. And that is the complaint, is it not, that you swore to before Wendell P. Kay as a notary public?

A. Yes, but that wasn't to the effect that I had seen Mr. Pickering.

Q. I just asked you a question. Is that the complaint which you swore to before Mr. Kay?

A. Yes.

Q. Now, I want to ask you what you meant by this statement:

“That thereafter and during the month of March, 1949, the plaintiff was instrumental in obtaining one John Doe Pickering to purchase said property.”

Now, what did you mean by that, Mrs. Eagleson?

Mr. Kay: Your Honor, if he is going to examine on that I would like to ask to examine—ask to amend the complaint to add “during the month of April, 1949,” to conform with the proof. The proof is that her activities with Mr. Pickering was in April, 1949.

(Testimony of Clara M. Eagleson.)

The Court: If you want to amend I think you had better do it at the first opportunity, otherwise we might be confronted [115] with the situation that where counsel after a lengthy examination has discovered that the whole examination was futile.

Mr. Kay: I am sorry, I hadn't noticed that we said "March" I should have amended in that regard already.

The Court: Do you wish to make the amendment by interlineation now?

Mr. Kay: I would. I would like to take out the word "March" and substitute the word "April."

The Clerk: You want the "April" substituted for "March"?

Mr. Kay: That is true.

Q. (By Mr. Renfrew): May I proceed, your Honor? I will ask you the same question, Mrs. Eagleson, with the change in the month, what did you mean when you stated "That thereafter and during the month of April, 1949, the plaintiff was instrumental in obtaining one John Pickering to purchase said property"?

A. Well, by "instrumental" it was this, that Mr. White wanted us to bring about our former prospects or any new one and try to create such an interest in a possible sale to someone else that it would bring Mr. Pickering up to a better price.

Q. That is what you meant when you say you were instrumental in obtaining John Doe Pickering

(Testimony of Clara M. Eagleson.)

to purchase said property. A. Yes. [116]

Q. Now, I will ask you, did you bring around anyone else who made an offer of purchase of the property at any figure?

A. No, we brought several people but they did not make a positive offer.

Q. And you feel that the fact that you brought someone in to look at the place was instrumental in influencing Mr. Pickering to purchase it?

A. Well, the idea was to influence him to get up above \$30,000 and he did.

Q. Mrs. Eagleson, when did you first know what Mr. Pickering paid for those premises?

A. What his offer was first or what he paid?

Q. What he paid?

A. I think possibly that the first statement—first positive statement I heard was when Mr. White quoted the price that he sold from.

Q. When was that?

A. On the stand this morning.

Q. Now, in your complaint you alleged that upon information and belief the property was sold to John Doe Pickering for \$45,000?

A. I heard that; it was only hearsay. And I also heard the price of \$37,500 and that was hearsay. But the only positive price that I have heard and I can say that I know was positive coming from the first parties was this morning coming [117] from Mr. White, the amount of \$35,000.

Q. Now, then, when you instituted this lawsuit you didn't know whether Mr. White had sold that

(Testimony of Clara M. Eagleson.)

business for \$30,000 or less, did you, or more?

A. No, I didn't know positive. I hadn't seen it in figures.

Q. Had anyone told you that knew the facts or who purported to know the facts?

A. No, no, no one that I can say really knew.

Q. Were you basing your contention when you instituted this action on the fact that the new arrangements—you state that you made with Mr. White—if he could get Mr. Pickering above \$30,000 up to \$32,000 you were supposed to get that \$2,000?

A. No, that wasn't the arrangement. I told him that if he had to take such a whipping that I would cut my commission. You see, 10-percent on \$30,000 would be \$3,000 and I said "I will cut my commission to \$2,000 and that will help you along and take a licking along with him" and there was no special price mentioned, only if he got above \$30,000 that he was to pay the commission, which I had agreed to take at that time, of \$2,000.

Q. Now, was that arrangement conditioned upon the fact that if you were able to get a buyer who would make a concrete offer so that Mr. Pickering who could be faced with an offer [118] of "Here is Mr. Uran now who will give \$35,000 for this, what will you give, Mr. Pickering?" Wasn't that offer contingent upon such an arrangement as that?

A. No, it wasn't; it was more an idea of stimulation—a desire to purchase of Mr. Pickering—desire to purchase. There is no concrete dickering of where you must get me an offer.

(Testimony of Clara M. Eagleson.)

Q. In other words, when you had your conversation, which was on the 23rd of April——

A. Uh huh.

Q. ——Mr. Pickering had already offered \$30,000 according to what your recollection of what Mr. White had told?

A. Only what Mr. White told me; I had never met Mr. Pickering.

Q. But Mr. White told you that he had had a \$30,000 offer from Mr. Pickering? A. Yes.

Q. And you were never able to even get an offer of \$30,000, were you?

A. Well, Mr. Renfrew——

Q. Answer the question yes or no.

A. I don't say I wasn't able to.

Q. Did you ever procure an offer of even \$30,000 and advise Mr. White of it?

A. Not in round figures. I was asked for his lowest [119] cash figure and he wouldn't submit it to me.

Q. But your lowest cash figure according to your listing was a sale of the property at \$45,000, isn't that true?

A. No, that wasn't the lowest, that was tops and we were to submit if we got anything different and everything we did get we did submit to Mr. White but he would not cooperate by stating his lowest cash price, Mr. Renfrew.

Q. Am I in error or do I understand that you maintain according to your complaint that you had a listing on this property in which you had the

(Testimony of Clara M. Eagleson.)

exclusive right to sell it providing you sold it for \$45,000, now is that correct or is that false?

A. I don't quite understand your question. You had better say it again.

Mr. Kay: I object to it; the document speaks for itself.

Mr. Renfrew: It is a part of the complaint. She swore to it and attached it to the complaint.

Mr. Kay: And it speaks for itself.

The Court: The fact that it is attached to the complaint wouldn't take it out of the rule that it speaks for itself.

Mr. Renfrew: Since she has invoked, your Honor, this question of maybe another contract which was made at sometime in April of 1949, I think she states the 23rd——? [120]

The Court: If that is a fact you may examine her without limit.

Mr. Renfrew: May I now refer to the original contract with regard to this \$45,000?

The Court: You may ask the question and see what the form of it is.

Q. (By Mr. Renfrew): Did you not understand, Mrs. Eagleson, that the only price that you had that you could sell this property for was \$45,000?

Mr. Kay: I object to that; the contract speaks for itself, your Honor.

The Court: Well, but if she had any different understanding from it, I think she may answer it.

The Witness: Mr. Renfrew——

(Testimony of Clara M. Eagleson.)

Mr. Renfrew: Just answer that question yes or no.

The Witness: I can't answer it yes or no.

Mr. Kay: How can she do it?

The Witness: I——

Mr. Renfrew: I will make the question simpler.

Mr. Kay: Do that.

Q. (By Mr. Renfrew): Did you understand that you could sell that property without consulting Mr. White or Mrs. White for less than \$45,000?

A. No, sir.

Q. Did you understand that you could sell it bona fidely and that you had a right to if you secured \$45,000 for it? A. Yes.

Q. Did you at any time ever have any agreement with Mr. White or Mrs. White that you could sell that property for less than \$45,000?

A. No, not——

Q. "No" that is enough.

A. Am I not allowed to explain, your Honor?

The Court: If you want to explain your answer you may do so.

The Witness: Mr. White when he talked with me about listing his place he said "Submit me any reasonable offer."

Q. (By Mr. Renfrew): You have testified to that previously, but now I will ask you again: Did you ever at any time submit any offer to Mr. White for the sale of his property at any figure that you had an offer to buy this property at any figure?

(Testimony of Clara M. Eagleson.)

A. I am going to repeat the answer that I made to you about Mr. Uran, he had cash money to offer and he wanted to hear Mr. White's best offer. He would not pay \$40,000 and he wouldn't pay \$45,000 but he would entertain a lesser figure if Mr. White was interested in giving him one.

Q. And that is the only offer you ever tendered Mr. White [122] was "Here is a man who has \$4,000 to pay down but he won't pay \$45,000 and he won't pay \$40,000, will you take any less?"

A. That is right.

Q. And Mr. White said "I will not"?

A. No, he did not.

Q. What did he say?

A. He didn't answer at all; he never has answered.

Q. He never answered? A. No, sir.

Q. And that is the only offer you ever had for the property?

A. That I could possibly submit as an answer, yes, sir.

Mr. Renfrew: I think that is all, your Honor.

Mr. Kay: I have no further questions.

Perhaps in view of your Honor's admonition perhaps it would be wise at this time to ask to make one other amendment to conform with the proof. At the time of the drafting of the amount we did not know the correct amount, that amount appears to be, according to the exhibit, \$35,000. I would ask leave on the second page of the complaint to amend the "Forty-five" to insert the words

(Testimony of Clara M. Eagleson.)

“Thirty-five” and the same in the fifth line and in paragraph four to substitute \$3500 for \$4500 and wherever it appears in the fifth paragraph.

The Court: The amendment is allowed.

Mr. Kay: Plaintiff rests, your Honor. [123]

The Court: Are you ready to proceed with your case?

Mr. Renfrew: Just for the purpose of the record, I am wondering if I shouldn't make a motion, your Honor. Could I have just a moment to review this?

I wish to make a motion for judgment on the pleadings on behalf of the defendant. I don't care to argue it.

The Court: Very well, the motion is denied. You may proceed.

Mr. Renfrew: I wish to call Mr. Pickering, your Honor.

HERBERT E. PICKERING

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Mr. Pickering, will you please state your full name and spell your last name?

A. Herbert E. Pickering, P-i-c-k-e-r-i-n-g.

Q. And how long have you been in the Territory of Alaska, Mr. Pickering?

A. I first came to the Territory in 1946.

(Testimony of Herbert E. Pickering.)

Q. Have you been in business in Anchorage and other cities in the Territory?

A. I have been in business in Fairbanks from a period of from 1941 until coming to Anchorage, at which time I started [124] working with Mr. White.

Q. I will ask you what time it was that you came to Anchorage?

A. On the 25th of February, 1949.

Q. On the 25th of February, 1949?

A. That is right.

Q. And at that time did you seek employment at the Whites' place of business?

A. No, sir.

Q. Did you subsequently seek employment with Mr. White?

A. Not in the sense, Mr. Renfrew.

Q. Explain to us, were you employed by him?

A. No. Mr. White and I had made an arrangement whereby I would trade certain services for him in return for the learning of the candy business.

At the time that that verbal arrangement was made I had no idea of buying the L-W Chocolate Shop. My intention was to learn the candy business and perhaps go back to Fairbanks and start a candy business.

Q. Then, in the strict sense of employment you were never employed? A. That is true.

Q. But you did work in the White Candy Store in consideration of him teaching you to make candy,

(Testimony of Herbert E. Pickering.)

is that your statement? A. Yes, sir. [125]

Q. And how long were you so employed?

A. I think from approximately the 10th of March until the day that I purchased the L-W Chocolate Shop, which was May 1st.

Q. Now, to my right are sitting, I believe, Mr. Eagleson, are you acquainted with him?

A. No, sir.

Q. Did you ever meet him? A. No, sir.

Q. And the next gentleman is Mr. Rentschler, do you know Mr. Rentschler?

A. I have seen his face.

Q. Have you ever met him?

A. I have never been introduced to him.

Q. And the next lady is Mrs. Clara Eagleson.

A. I met Mrs. Eagleson on the 10th of this month when she came into the L-W and introduced herself as Mrs. Eagleson in behalf of the Chamber of Commerce, at which time she asked me to come——

Q. I don't care about that. That is the first time you met her, is that true? A. That is true.

Q. Now, I will ask you, during the time from about March 10th, 1949, until May 1st when you state you purchased the L & W Candy Shop, did you know during that interim that the place was for sale? A. Yes, sir. [126]

A. Yes, sir.

Q. And I will ask you whether or not during the time that you were there did you ever see any prospects being brought into the place by any of these people? A. I did.

(Testimony of Herbert E. Pickering.)

Q. And about how many times, if you can recall?

A. One time only.

Q. Were you there every day?

A. Yes, sir.

Q. And what hours did you work ordinarily?

A. My working hours with Mr. White was from 7 or 8 in the morning until 11:30 every night and sometimes until 1:30 or 2:00 the next morning.

Q. Do you recall an instance when someone came in with regard to the purchase of the place?

A. Yes, sir.

Q. And do you know who that was?

A. I am unable to tell you the man's name, I know that he was a very tall man. It is my understanding that he was from Portland. Mr. Rentschler brought him in.

Q. This gentlemen now sitting right here?

A. Yes, that is right,—

Q. Yes—

A. —however, of the conversation or of what took place I don't know. I was busy in the back room making candy for [127] the Easter Day—for the Easter coming up.

Q. The previous Easter?

A. That is right.

Q. Could you state from the fact that you were making candy for Easter about the time that Mr. Rentschler and the gentleman came in?

A. No, I haven't given it any thought; I couldn't tell you. I presume it was in the month of April; I presume it must have been.

(Testimony of Herbert E. Pickering.)

Q. Is that the only time that you know of that you ever saw anyone in the company of Mr. Rentschler? A. He is the only one that I ever saw.

Q. That came in to look the place over?

A. That is right.

Q. Now, when did you first discuss the purchase of this business or the possible purchase of this business with either Mr. or Mrs. White?

A. I would say sometime after the first of April.

Q. Sometime after the first of April?

A. That is right.

Q. And was any concrete deal made for the purchase of this property by yourself during that month?

A. We discussed the price that Mr. White would sell the property to me contingent upon my being able to raise the money and above all not until after the first of May. [128]

Q. And I will ask you why you added that last statement "above all not until after the first of May"?

A. Because it was my understanding through Mr. White that it would be unnecessary to deal with any agency after the last day of April.

Q. Did you have any understanding at all with regard to whether or not the property could be sold prior to May first by the Eagleson agency?

A. I was told by Mr. White that the property could be sold to anyone else up to the time of the expiration, which I heard was the last day of April.

(Testimony of Herbert E. Pickering.)

Q. And is that the date you purchased this property? A. First of May.

Q. First of May? A. First of May, 1949.

Q. Did you ever have—I will ask you, was there any wrangling over price between you and Mr. White on the sale of this?

A. Absolutely none.

Q. When was the price agreed upon?

A. I would say within a period of two or three days from the time that he discussed the selling price, which was a price which I could handle; in other words, any price above the \$35,000 I wouldn't even consider, neither did I attempt to buy it for less. [129]

Q. The only figure you ever discussed was \$35,000? A. That is right.

Q. And you were cognizant of the fact that the property could be sold by Eagleson's to any purchaser up to the first of May?

A. That is true.

Q. And did you know what price it was listed for?

A. I didn't know specifically what price that he had it listed with this particular agency; I was aware that he had had it listed at various prices upward from \$35,000.

Mr. Renfrew: I think that is all, your Honor. Just one further question.

Q. Did you ever have any discussion with Mr. White about the fact that this property was listed

(Testimony of Herbert E. Pickering.)

with the agency and that you could make a deal with them if you wanted to, anything of that nature?

A. Will you clarify that a little bit?

Q. Well, the question is objectionable if counsel wishes to object to it,——

Mr. Kay: Oh, go ahead.

Mr. Renfrew: ——so I guess I had better let him

The Witness: I really didn't hear you, Mr. Renfrew.

Mr. Renfrew: That is all right, I will withdraw the question and let Mr. Kay ask it. [130]

Cross-Examination

By Mr. Kay:

Q. I believe you said, did you not, Mr. Pickering, that you agreed on the price with Mr. White within a few days after you first discussed it with him?

A. That is true.

Q. And your first discussion with him was sometime shortly after the first of April, is that correct?

A. That is true.

Q. So you had definitely agreed on the sale price of \$35,000 with Mr. White early in the month of April, 1949?

A. May I add: Yes, only contingent upon my being able to liquidate certain assets in Fairbanks.

Q. Now, had you also agreed with Mr. White on the terms of payment, Mr. Pickering?

A. Yes.

Q. You had agreed that you were to pay whatever the contract—\$9,000 down, is that correct?

(Testimony of Herbert E. Pickering.)

A. No.

Q. I am sorry, \$6,000 down?

A. That is right.

Q. And \$29,000 on terms according to the contract as it was drawn up later, is that correct?

A. That is right.

Q. Then the only contingency on your purchasing at that [131] time was your ability to liquidate your Fairbanks assets; now when did you start to liquidate your Fairbanks assets, Mr. Pickering?

A. Previous to the 21st of April.

Q. Previous to the 21st of April?

A. Uh huh.

Q. Did you make a trip to Fairbanks to bring that about? A. Yes.

Q. Could you tell us approximately when you went up to Fairbanks?

A. I think it was either the 16th or 17th of April.

Q. And would you mind telling us, sir, what the contingency was or what you went to Fairbanks to accomplish, Mr. Pickering?

A. Will you ask your question more directly; I didn't quite follow you.

Q. All right, sir, I am sorry. I will strike the question and ask you another one. Just exactly what was it that you went to Fairbanks to do?

A. I went to Fairbanks to raise money for the exact purpose of buying out the L-W Chocolate Shop, the deal to take place after the first of May.

Q. And, I am sorry, I missed the date on which you went to Fairbanks?

(Testimony of Herbert E. Pickering.)

A. Either the 16th or 17th of April. [132]

Q. Now, were you successful in your transaction in Fairbanks in raising the money or doing whatever it was you were going to do?

A. A part of it, yes.

Q. Could you give us the approximate date on which you returned from Fairbanks?

A. On the 20th of April.

Q. On the 20th of April? A. That is right.

Q. And at that time you had accomplished your transaction, had you? A. Not completely.

Q. What remained to be done, Mr. Pickering?

A. In order to liquidate certain assets it was necessary for me to take certain notes, paper, which I attempted to sell in Anchorage and was unable to.

Q. Yes, sir.

A. As a matter of fact I was unable to get the balance of the money from Fairbanks until the afternoon of May 1st.

Q. So, would you mind telling us how much of the money you had up until April 30th?

A. \$5,000.

Q. About how much, sir? A. \$5,000.

Q. And then there was one additional thousand that was [133] still coming from Fairbanks?

A. That is right.

Q. And that arrived on the afternoon of May 1st?

A. That is right.

Q. I believe you said that you and Mr. White had a definite understanding that the transaction

(Testimony of Herbert E. Pickering.)

was in no event to take place, I think were the words you used, until after May first?

A. That is true.

Q. Could I ask whether that was at your suggestion or Mr. White's suggestion?

A. I believe that I could answer that by saying that it was a mutual understanding.

Q. You understood that this was listed with the Eagleson Agency, is that correct?

A. I understood that it was listed with an agency; I didn't know which one.

Q. And that the agency had an exclusive right to sell until May first?

A. That is true.

Q. And then if any sale was made before May 1st a commission would have had to have been paid through the agency, you understood that?

A. I presume that Mr. White would have had to pay commission. [134]

Q. And so you and Mr. White agreed to not carry out this transaction until May 1st?

A. That is right. May I add that I was also aware of the fact that the place could have been sold in my absence in Fairbanks or up to the last day of April. May I also add that my liquidation of these assets in Fairbanks was the—the immediate need was to purchase the L-W Chocolate Shop, but I had just retired from the air cargo business in Fairbanks and was in the process of liquidating those assets anyway.

Q. Well, now, when did you first go about the

(Testimony of Herbert E. Pickering.)

preparation of the necessary papers—the conditional sales contract—do you recall that?

A. Yes, sir, on the 21st of April.

Q. 21st of April? A. That is right.

Q. Was that the date on which the contract which you later signed on May 1st was actually drawn up?

A. It was discussed and I presumed drawn up at that time.

Q. You had agreed on all of the features of the contract and as far as you know it was drawn up on April 21st? A. That is right.

Q. Did you and Mr. White go to the offices of Davis & Renfrew in order to get those details through? A. That is true.

Q. And all of the details of the contract were given to [135] them and they were told to go ahead and draw up the contract? A. That is right.

Q. As I understood it, I am just trying to get your testimony straight, between March 10th and the time shortly after the first of April when you held the first discussion with Mr. White about the purchase, your only purpose in being in the place was to learn the business, is that correct?

A. That is true.

Mr. Kay: No further questions.

Redirect Examination

By Mr. Renfrew:

Q. You state that you made up your mind with Mr. White on the details on or about the 21st of

(Testimony of Herbert E. Pickering.)

April, that was about when you returned from Fairbanks?

A. We discussed the details previous to my leaving Fairbanks.

Q. But you told Mr. Kay, did you not, that you came down to the office of Davis & Renfrew on the 21st of April? A. That is true.

Q. And at that time you gave someone in the office the information in connection with the sale of this property? A. I believe that is right.

Q. And you signed these papers on what date?

A. The first of May. [136]

Q. First of May?

A. Papers were not signed at the time the details were made.

Q. Did you ever see those papers when you came back there?

A. I have not seen those up to this day; they are in escrow at the bank.

Q. You did sign them? A. Yes, sir.

Q. Did you see them prior to the date that you signed them? A. Oh, yes.

Q. You had looked them over before you signed them? A. Thoroughly.

Q. Several days or the day——

A. I believe that Mr. White and I went to the offices and read them several days before the first of May, but then upon—and I believe that there was a small change or two, unimportant, and then on the first of May before we signed them we read them carefully.

(Testimony of Herbert E. Pickering.)

Q. Did you understand that this property could be sold at any time up to May the first and that you didn't have any deal with Mr. White?

A. That is true.

Q. You understood that all the time?

A. Yes, sir. And, if I may add, there is evidence by way [137] of telegrams to Fairbanks which would substantiate that truth. In other words, I was aware of the fact that was I not able to raise that money at that time that the place could easily have been sold to anyone who would offer that price or a higher price to Mr. White. He was going to sell.

Q. But did you understand that the Eagleson's could have sold the property or rather the real estate agent could have sold that property at a given figure, any figure, up and until May 1st and that you had no right to the property until after that option expired?

A. That is very true.

Q. You understood that?

A. Oh, yes, Mr. White was in full control. He had the right to sell it to anyone. Our deal didn't go until the first of May.

Q. Did you at any time discuss with Mr. White going to see the agent—the real estate agent?

A. Only what has been shown here that I preferred to deal only with Mr. White because of the fact that I had known Mr. White for several years and there was no need to go to any agency.

Q. Were you at all concerned about the fact that the agent might sell that property before May 1st to someone else?

(Testimony of Herbert E. Pickering.)

A. As I have previous said a moment ago, I was in the process of liquidating one business; I was searching for another [138] business. I was anxious to buy the L-W Chocolate Shop, but it wasn't too important. Had someone else bought it I had other plans.

Q. Your deal was not consummated until what date? A. First of May, 1949.

Mr. Renfrew: I think that is all.

Mr. Kay: I think that is all.

The Court: Ladies and gentlemen of the Jury, we are about to recess the case now until ten o'clock tomorrow morning, at which time you should be back in the jury box.

(Whereupon, at 5:00 p.m., Monday, February 20, 1950, the proceeding was recessed until 10:00 a.m., Tuesday, February 21, 1950.) [139]

February 21, 1950

The Court: You may call the roll of the trial jury.

(Jurors' names were called and responded to.)

The Court: You may proceed.

Mr. Renfrew: I wish to call the defendant, Mr. White.

LAWRENCE A. WHITE

called as a witness on behalf of the defendant, having previously been duly sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Mr. White, you have been present in the courtroom during the entire trial of this case and you heard Mr. Rentschler testify, did you not?

A. Yes, sir.

Q. Now, do you have a definite recollection of his calling on you with regard to the extension of the contract?

A. I do.

Mr. Renfrew: Your Honor, I have to speak quite loudly because Mr. White is hard of hearing.

Q. I will ask you if you can relate as nearly as possible the conversation which took place between you and Mr. Rentschler on that occasion?

A. Well, Mr. Mitchell came in and he said he had a hot prospect to sell the business if I would give him an extension [142] on it and I said, "Well, I will give you until April 30th," and he said he

(Testimony of Lawrence A. White.)

thought he could sell it in that length of time if I would give him that much time on it and that was the conversation between Mr. Rentschler and I.

Q. You heard Mr. Rentschler testify that to the best of his recollection that conversation occurred approximately April the 8th? A. Yes, sir.

Q. Does that meet with your recollection?

A. That is about the time.

Q. That is about the time it occurred?

A. Yes, sir.

Q. Now, did Mr. Rentschler after that time bring in a prospect to your place of business?

A. He did not.

Q. At no time did you ever see one, is that correct? A. After that extension I did not.

Q. After that extension you didn't see anything?

A. Didn't see any at all.

Q. Now, you, of course, heard Mrs. Eagleson testify with regarding a conversation which took place in her office, I believe she stated, about April the 23rd? A. Yes, sir.

Q. Do you remember having a conversation with her in her place of business at that time or about that time? [143] A. I do.

Q. Will you relate to the jury what your recollection of that conversation is, in your own words?

A. Well, I told Mrs. Eagleson that I had a fellow that had wanted to buy the place but he couldn't afford to give that price.

Q. What price? A. \$45,000.

Q. Yes.

(Testimony of Lawrence A. White.)

A. And she asked me if I would have him to come over, and I says "Well, I will ask him and see what he will do," and he said "No, he wouldn't go over because he still couldn't afford to pay that price," so I told her if she could get that much money out of it to go ahead, but if not I would have to wait until after that April 30th and talk to him myself. So that is about all of the conversations I remember having with Mrs. Eagleson.

Q. Now, do you recall whether or not the price was mentioned as to what Mr. Pickering had offered? A. \$35,000.

Q. And do you recall whether or not there was any discussion about raising the price to \$37,000 and giving her two thousand?

A. That discussion did not come up, no, sir.

Q. Did you at that time reiterate to Mrs. Eagleson that [144] if she can sell the property at a figure which would let you out at \$35,000 that she, of course, had the listing and to go ahead and do so?

A. I didn't exactly understand that.

Mr. Kay: I will object to the question as leading and suggestive.

The Court: Will you repeat the question?

Mr. Renfrew: I will withdraw it.

Q. Have you stated the entire conversation between you and Mrs. Eagleson with regard to the sale of the property that you had with her at that time?

A. Well, not as I remember, no, sir.

Q. Was there anything more said at that time that you can recall?

(Testimony of Lawrence A. White.)

A. I don't think there was, no, sir.

Q. Did she say anything to you about having any immediate prospects for sale? A. She did not.

Q. How did you happen to go over to Mrs. Eagleson's office?

A. Well, I went over to talk to her to see if she had any prospects to sell it and I was just passing by there and I just knew it was listed with her and knowing it was listed with her I just stopped to talk to her to see if she had had any clients and that was the main reason for going over there.

Q. Was it in response to her phoning you or did you go [145] over there of your own volition?

A. My own; she didn't phone.

Q. You are sure of that? A. Positive.

Q. Did Mrs. Eagleson or Mr. Rentschler at any time during the original contract, in the interim, or after you granted the extension ever make you any offer for the purchase of your property?

A. Never did.

Q. You heard the testimony of this young man who was down at the freight shed some place who stated that he had a conversation with you? That is the boy that was the neighbor of Mr. Rentschler.

A. Easley?

Q. Easley, that is his name.

A. Well, I don't ever remember at any time ever having a conversation with that gentleman. He used to come into my place, was one of my customers, but I just spoke to him and that is all, I don't remember

(Testimony of Lawrence A. White.)

at any time ever having a conversation with him and I am positive I did not.

Q. Is it possible that you could have had a conversation? A. Well, I don't think so.

Q. You had no recollection? A. No, sir.

Q. Now, the other boy that testified—— [146]

A. ——Mr. Dayton?

Q. ——Mr. Dayton, do you remember ever stating to him that you had sold the place or you were selling the place to the man in the back or the man that was working in there?

A. I never discussed anything concerning business to Mr. Dayton. He was one of my employees—at that time he was not—but he was prior to this last extension, but I never discussed business with Mr. Dayton at all.

Q. Did he work there when Pickering worked there? A. No, sir, he did not.

Q. You have no recollection of stating to him that you were selling the place?

A. I have no recollection at all; in fact, I don't think I ever mentioned to him.

Q. Is it possible that you did?

A. No, I don't think so.

Mr. Renfrew: I think that is all.

Cross-Examination

By Mr. Kay:

Q. Mr. White, I didn't get whether you said positively that you did not have any conversation with Jack Easley down at the freight depot?

(Testimony of Lawrence A. White.)

A. I did not.

Q. You heard Mr. Easley's testimony here yesterday? A. Yes, sir, I did. [147]

Q. And it is your testimony that no such incident ever occurred? A. With——

Q. Easley?

A. That is right, I never even talked to him at all.

Q. Not a word of truth in anything that he said from the witness stand? A. How is that?

Q. There wasn't a word of truth in anything he said from the witness stand?

A. All that I have ever said to that fellow is spoke to him.

Q. So he was not telling the truth?

A. I never did hold a conversation with him.

Q. And the same goes for Mr. Dayton?

A. Well, I have talked to Mr. Dayton, but during that time Mr. Dayton was not even around my place, never did come into my place of business after he quit working for me.

Q. You heard Mr. Dayton testify that he was talking to you there in the shop and had inquired as to who these new faces were, meaning Mr. Pickering or his son, I suppose, and that you said "Yes, I am selling to those people." Now, did any such conversation occur?

A. I just answer that question just prior to this. He never was in my place of business and therefore I didn't talk [148] to him.

Q. Then it is your testimony that no such conversation occurred?

(Testimony of Lawrence A. White.)

A. I had no conversation with Mr. Dayton, absolutely.

Q. Then everything that Mr. Dayton said from the witness stand was not the truth?

A. Well, I don't say the man deliberately was not telling the truth, but I say that I didn't have a conversation with him.

Q. Well, if you didn't have a conversation with him, then his testimony was not the truth, is that right?

A. That is the way I would take it, yes, sir.

Q. Well, now you heard Mr. Pickering testify yesterday, did you not? A. I did.

Q. And did you hear Mr. Pickering testify that during the extension period Rentschler brought in one man—a very tall man—that he remembered?

A. I did, that is right.

Q. Do you remember that occasion on which Rentschler brought in a very tall man?

A. I certainly do.

Q. Do you recall who that was?

A. Well, if I remember his name was—this fellow by the name of Urand.

Q. Did you have any discussion with Mrs. Eagleson about [149] Urand and his offer to purchase?

A. I only talked with Mr. Rentschler about that.

Q. What conversation did you have with Mr. Rentschler about Eugran?

A. Well, the best I can remember, Mr. Rentschler came back and said he thought the fellows were

(Testimony of Lawrence A. White.)

interested, but they had to raise the money and they was having difficulty in raising the money.

Q. Any discussion with him about the amount of the down payment which you would require?

A. There was nothing said about that because the money hadn't been raised and they hadn't been able to raise the money yet, so that hadn't been discussed yet.

Q. You were requiring any prospects that Mrs. Eagleson produced to have a fifty percent down payment, were you not?

Mr. Renfrew: Objected to now, as the contract speaks for itself on that.

Mr. Kay: There may have been some later modification or oral instruction; the principal has the right to instruct his agent.

Mr. Renfrew: There may have been such an oral conversation, but we haven't heard anything about it, your Honor.

Mr. Kay: That is what I am asking him about.

The Court: The objection is overruled.

By Mr. Kay: [150]

Q. You may answer that question, Mr. White?

A. Would you ask it again?

Q. Yes, you had been requiring Mrs. Eagleson—any prospects that she produced to have a fifty percent down payment, had you not?

A. Not—no, I did not.

Q. Did you ever have any discussion with Mrs. Eagleson about the amount of the down payment required?

(Testimony of Lawrence A. White.)

A. I told her if she sold the place for \$45,000 I would like to have in the neighborhood of \$12,000 down on it.

Q. Are you sure that wasn't \$20,000?

A. I am positive it wasn't.

Q. Now, you heard Mr. Pickering—or—Did you hear Mr. Pickering testify that early in April shortly after April 1st you began negotiating with Mr. Pickering for sale of the property, is that right?

A. I talked to Mr. Pickering during the month of April, yes, sir.

Q. How early in the month of April?

A. Well, I don't remember the exact date; it was, I would say, sometime around the middle of April sometime.

Q. Well, could it have been as early as the first week in April?

A. No. I think it was a little later on in the month than that. [151]

Q. Was it before or after you gave Mr. Rentschler the extension?

A. Well, if it was in the middle of April it must have been after.

Q. Was it after?

A. Well, I presume it was.

Q. Then if you gave Mr. Rentschler the extension on April 8th, a few days later you began negotiating with Mr. Pickering, right?

A. Yes, sir.

Q. Right? A. Yes, sir.

(Testimony of Lawrence A. White.)

Q. Did you have a conversation with Mr. Rentschler about Mr. Pickering?

A. I never did mention Mr. Pickering's name to Mr. Rentschler, no, sir.

Q. Did you hear Mr. Rentschler testify that early in April you requested him to help you get Mr. Pickering up to a higher figure?

A. I heard that, yes, sir.

Q. Did you have such a conversation with Mr. Rentschler? A. I did not.

Q. No such conversation ever occurred?

A. No such conversation.

Q. Did you request Mr. Rentschler to assist you in stimulating [152] Mr. Pickering to a higher price? A. No, sir.

Q. Did you tell Mr. Rentschler not to contact Mr. Pickering? A. I did not.

Q. Never discussed Mr. Pickering with Mr. Rentschler at any time? A. At any time I did not.

Q. You are familiar with Plaintiff's Exhibit 1, are you not, Mr. White? A. Yes, sir.

Q. And you understood, did you not, Mr. White, that if a sale was made by you or anyone within 60 days after the termination of that agreement or the extension thereof to anyone with whom Mrs. Eagle-son or any of her representatives had negotiated that you would be liable for the commission?

Mr. Renfrew: Just a moment, I wish to make two objections, your Honor; one is this, this is improper cross-examination, not having been touched upon upon direct examination, and the other is the

(Testimony of Lawrence A. White.)

Court limited me on examination of the contract because the contract spoke for itself. I wasn't able to ask the question "What they understood?" for it and the Court sustained the objection.

The Court: This isn't a question directed to the contents of the agreement; it is proper cross-examination as [153] as I view it. Objection overruled.

Q. (By Mr. Kay): You may answer the question.

A. Okeh, ask me again.

Mr. Renfrew: Your Honor, I wish to ask the Court's indulgence. I would like to have you again review my last objection. I made the same request of Mr. Rentschler and of Mrs. Eagleson and the Court refused my interrogation of those questions.

The Court: I don't recall anything of that kind.

Mr. Renfrew: Well, I will stand on the record, your Honor; I asked them questions about the contract, what their understanding was, and counsel got up and objected on the grounds that the contract spoke for itself, and this very question is what the contract speaks for itself.

The Court: Of course it is one thing to ask the witness what his understanding of a contract is because it is too general and to be anything, but when you call his attention to a specific provision in the contract and ask him if he doesn't understand that, there isn't anything objectionable about that it is proper cross-examination.

Mr. Renfrew: Your Honor, may I ask what provision of the contract this question refers to?

(Testimony of Lawrence A. White.)

The Court: It is the 60-day provision.

Mr. Renfrew: Then can I ask counsel to confine his [154] question to that; he has asked three questions, he has asked about three different places in the contract in that question.

Mr. Kay: Maybe if I start over again, your Honor, I can satisfy Mr. Renfrew.

Q. Mr. White, you understood, did you not, that this contract covered a sale made during a period of 60 days after the termination of the contract if such a sale was made to any person with whom the agent, Mrs. Eagleson, had dealt? A. Yes, sir.

Q. So you understood then that if Mrs. Eagleson or Mr. Rentschler negotiated with Mr. Pickering during the month of April and you later sold to Mr. Pickering within 60 days after the 1st of May that you would have to pay Mrs. Eagleson a commission?

A. Well, I understood if I negotiated with anyone that came to me, certainly.

Q. You knew you would have to pay a commission? A. Yes.

Q. What was Mrs. White doing around the place during the month of April, Mr. White?

Mr. Renfrew: I object now that this witness, your Honor, was originally called by the plaintiff as his own witness and we did not cross-examine this witness on his testimony at that time and then at a later date we put him on as our witness and we asked him questions and now counsel has the [155] right, according to my understanding of the law, to cross-examine him on the points brought out by the

(Testimony of Lawrence A. White.)

direct examination. Now, I feel that I have a right to objection on the grounds that counsel is now seeking to bring out matters which were not brought out on direct examination and he has the advantage in doing it by cross-examination allowing him to ask leading direct questions which is not proper, your Honor. He can call this man back as his own witness in rebuttal if he wishes to do so, but he is going clear outside the scope of the direct examination.

The Court: You mean of your direct examination?

Mr. Renfrew: Yes, certainly he is.

The Court: I don't think that the scope is so limited. The cross-examination is not limited to the very matters the witness is questioned about in direct; the scope of it is broader than that and this is clearly, I think, within the scope. Objection overruled.

Q. (By Mr. Kay): You may answer the question, Mr. White.

A. Why, she was working there; she was doing cashier work; she was dipping chocolates. I guess that is about all.

Q. She was present in the shop every day during the month of April, would you say, Mr. White?

A. Yes.

Q. Did she know of your negotiations with Mr. Pickering? [156]

A. No, I don't believe it was ever discussed; never did discuss it.

Q. At any time during the month of April?

(Testimony of Lawrence A. White.)

A. With my wife?

Q. Yes, sir? A. No, sir.

Mr. Renfrew: Do you have reference to the discussions with Mr. Pickering with regard to the sale or his employment?

Mr. Kay: The sale I am talking about.

Q. Did you discuss the sale of the business to Mr. Pickering with your wife during the month of April? A. I answered that.

Q. You did not? A. No, sir.

Q. Your wife was there every day, I think you said? A. Yes, sir.

Q. Was she a partner in the business?

A. Yes, sir.

Q. And you were negotiating with Mr. Pickering all during the month or at least in the middle of the month on, were you not?

A. From the middle of the month on, I would say.

Q. You had discussions with him and agreed on a price, did you not?

A. We discussed it; didn't agree upon nothing, no, sir, [157] not until after April 30th.

Q. Did you go down to the office on or about April 21st and prepare the contract which you later signed?

A. We went down there and talked it over.

Q. And you went down later and looked over the contract? A. May 1st.

Q. Are you sure you didn't go down as Mr. Pickering testified yesterday you went first and gave him

(Testimony of Lawrence A. White.)

the notes and went back and looked at the contract?

A. We went down around the 20th—well, I don't remember the exact date.

Q. Before the 1st?

A. Before the 1st and went back on the 1st and that was the last time we were down there.

Q. But while all this was going on you never mentioned the fact to your wife that you are selling to Mr. Pickering?

A. To my recollection, no.

Q. Could your recollection be mistaken, Mr. White?

A. Well, I guess it is possible, sure.

Q. So, it is possible that you might just casually mentioned to your wife about selling to Mr. Pickering?

A. I talked to my wife about it on May 1st.

Q. You sprung it on your wife as a surprise on May 1st?

A. I don't know that it was a surprise.

Q. Was your wife in the shop when Mr. Rentschler came in [158] the shop to get the extension?

A. I don't know.

Q. It was during the month of April?

A. Certainly.

Q. And you say your wife was in the shop all the time during the day?

A. There were times when we both were out; I don't remember whether she was in or out.

Q. Did your wife—were any of the discussions

(Testimony of Lawrence A. White.)

with Mr. Rentschler held in the presence of your wife during the month of April, Mr. White?

A. I would say no.

Q. Mr. Rentschler was in several times, was he not?

A. Oh, not on that particular thing, no, sir; he might have been in there to have lunch or something.

Q. Have a cup of coffee?

A. Possibly was, I don't remember.

Q. And he brought in at least one prospect after April 8th, didn't he?

A. No, sir, not to my knowledge.

Q. He brought in this tall man?

A. That was prior to this new contract.

Q. That was prior to the extension?

A. That was way back in July or August sometime right after the first contract was drawn up with—— [159]

Q. It was your testimony then that after April 8th when you granted the extension he never brought anyone in to look at the place?

A. Not to my knowledge; he never introduced them to me if he did.

Q. Well, I asked you previously whether or not you heard Mr. Pickering testify that during the month of April Mr. Rentschler brought in a tall man, might have been from Portland, did you hear Mr. Pickering testify to that?

A. Well, I heard him testify, sure, but I don't remember him coming in the month of April. I thought it was before the month of April.

(Testimony of Lawrence A. White.)

Q. In fact, you thought it was back last summer?

A. I thought it was right after the other contract, sure.

Q. And you don't remember him bringing anyone in the month of April? A. I do not.

Q. Do you know whether or not your wife had any conversations with Mr. Rentschler during the month of April?

A. My wife doesn't know Mr. Rentschler.

Q. She doesn't know him?

A. She just met him one time and I don't think she would recognize him if she met him on the street today.

Q. Did your wife—your wife signed the original contract which—I guess it has been returned—the original authorization [160] to sell, did she not?

A. That is right.

Q. And she was in the shop every day during the month of April? A. Sure.

Q. She knew that you had given the extension to Mr. Rentschler? A. Yes, she knew that.

Q. Did she make—she didn't make any objection to that, did she, Mr. White?

A. No, she did not.

Q. But you don't know whether or not she ever had any conversations with Mr. Rentschler—casual conversations in the shop?

A. Not after the April the 8th, no, sir.

Q. Now, you, in your conversation with Mrs. Eagleson in April, was that about April 23rd?

A. Well, approximately, yes, sir.

(Testimony of Lawrence A. White.)

Q. How many days was that after you and Mr. Pickering had gone down to Davis & Renfrew's office and drawn up this contract?

A. Well, it was about, I would say, it was something about three or four days later probably.

Q. Then at the time you had the discussion with Mrs. Eagleson you had already agreed with Mr. Pickering on the [161] total sale price—the amount to be paid down and the amount to be paid each month, right?

A. Providing Mrs. Eagleson didn't sell the business.

Q. Yes. Did you tell that to Mrs. Eagleson?

A. I told Mrs. Eagleson that she had the exclusive on it until April 30th and I would not sell to anyone.

Q. And did you tell her that you had agreed with Mr. Pickering on all of the terms of the sale?

A. No, I did not.

Q. But you did tell her that your price to Mr. Pickering was \$35,000?

A. We discussed that, yes, sir.

Q. You are sure you said \$35,000 and not \$30,000?

A. 35.

Q. Didn't you, as a matter of fact, complain about the fact that you could only get \$30,000 from Mr. Pickering and you just couldn't afford to take that and pay a commission?

A. No, sir.

Q. Never said any such thing?

A. No, sir.

Q. And you knew that if you sold during the

(Testimony of Lawrence A. White.)

month of April you would have to pay a commission to Mrs. Eagleson?

A. Providing a client came through her.

Q. Whether or not the client came through her if you sold during the month of April? [162]

A. If she was instrumental in getting the party to buy, yes, sir.

Q. Didn't you understand that you had to pay a commission during the month of April regardless of whether she had anything to do or not?

Mr. Renfrew: I don't so understand that?

Mr. Kay: I am asking whether he understood it.

Mr. Renfrew: I object to this type of question on the grounds that it is specifically covered in the contract and I reiterate my objection on the same basis that the Court sustained Mr. Kay's objection yesterday—the contract speaks for itself.

The Court: It is not so much what the contract speaks for but the witness or party to the contract may be questioned as to what he did under it.

Mr. Renfrew: I would like to take a recess and let Your Honor review the record as to my questions of Mr. Rentschler and Mrs. Eagleson, my very words, unless I am absolutely mistaken—"Did you understand thus and so from that contract?" Counsel jumps up and objects and Your Honor sustains it on the grounds that the contract spoke for itself notwithstanding what she said; you can't alter the terms of a written contract.

The Court: That is not my recollection of what occurred awhile ago. What I understood that what

(Testimony of Lawrence A. White.)

you were asking was what the contract stated rather than what they did [163] under the contract or what they understood.

Mr. Renfrew: I wouldn't ask Your Honor what the contract stated, surely it is right before them, "the contract states thus and so, what is your understanding of that?" why it speaks for itself and those are the very words.

The Court: If the Court rules as you think the Court ruled yesterday the Court is in error and the Court is not going to repeat the error today because it is a perfectly proper question. The objection is overruled.

Mr. Renfrew: I wasn't sure that the Court was in error.

The Court: If I ruled the way you said I did I was in error. Is counsel for plaintiff satisfied with the lack of an answer?

The Witness: I think I answered that "No."

Q. (By Mr. Kay): In your conversation with Mrs. Eagleson when you mentioned Mr. Pickering did you tell Mrs. Eagleson that Mr. Pickering was allergic to real estate dealers or words to that effect?

A. I told her that he wouldn't come over and do business with real estate because he couldn't afford to pay that much money.

Q. Did you ask Mrs. Eagleson—did Mrs. Eagleson ask you if she couldn't contact Mr. Pickering and try to get him to [164] raise that price a little bit? A. I think she did.

(Testimony of Lawrence A. White.)

Q. And isn't it a fact that you requested Mrs. Eagleson to stay away from Mr. Pickering?

A. That is not true, no, sir.

Q. You were perfectly willing that Mrs. Eagleson should deal with Mr. Pickering?

A. I didn't understand that?

Q. Were you perfectly willing that Mrs. Eagleson should attempt to deal with Mr. Pickering?

A. I still don't get you.

Q. Were you perfectly willing that Mrs. Eagleson should deal with Mr. Pickering?

A. Well, if he would go to her, certainly.

Q. And you didn't request her or Mr. Rentschler to go see him?

A. I did not at any time.

Mr. Kay: That is all.

Redirect Examination

By Mr. Renfrew:

Q. Was Mr. Pickering advised that this property was listed with an agent?

A. Was he? Yes, sir.

Q. He knew that it was listed with a real estate agent?

A. That is right. [165]

Q. And did he know the price that you were asking for it through the agent?

A. Through the agency, he did not.

Q. He didn't know what price you were asking through the real estate agent?

A. Oh, yes, he knew that.

Q. He did or did not?

(Testimony of Lawrence A. White.)

A. I told him that it was listed through real estate people for \$45,000.

Mr. Renfrew: That is all. We rest, your Honor.

The Court: Do you have any rebuttal?

Mr. Kay: Could I have a moment to confer here and check my notes, sir, and perhaps take our recess now?

The Court: We will take a recess for ten minutes.

(Short recess.)

The Court: Do you have any rebuttal?

Mr. Kay: No rebuttal.

The Court: You may proceed to argue the case.

Mr. Renfrew: I wish to make a motion, Your Honor.

The Court: In the absence of the jury, I presume?

Mr. Renfrew: I think so, sir.

The Court: The jury may retire until recalled.

Mr. Renfrew: If it please, Your Honor, at this time the defense wishes to make a motion for judgment—directed verdict of judgment for the defendant on the grounds that the [166] plaintiff has totally and wholly refused and failed to prove her case. The allegations in the complaint, Your Honor, specifically allege that during a certain period the plaintiff was instrumental in obtaining one John Doe Pickering to purchase said property and on the basis of the assistance which the plaintiff rendered a sale was made by the owner. The Court will recall that not only did Mrs. Eagleson testify

on the witness stand that she at no time ever consulted or talked with Mr. Pickering but that she not only never secured any offer from him but neither did she ever get a firm offer of any price from anyone else.

Now, I will go right back to the Exhibit "A," which is attached to the complaint, which is a copy of the contract of agency or employment which I believe, Your Honor, has to be read en toto. You can't just pick out just one part and read it, and I refer to the last paragraph of the Exhibit which states "I hereby list said property exclusively with said agent for a period of 60 days. I agree to pay said agent the commission set forth in this agreement if a sale is made within 60 days after the termination of this authorization to sell to parties with whom said agent negotiated during the time of the authorization to sell."

Now, Your Honor, there isn't one shred of evidence before the court that in any manner did Mrs. Eagleson or any of her sub-agents procure the cause of this sale to Mr. Pickering [167] and I submit that there is nothing in the record which the jury could infer that she in any way assisted in this sale.

Now, counsel has taken the position—I have read some of his proposed instructions—that it doesn't make any difference whether they had rendered any assistance in the procurement of the sale or not. He apparently takes the position that if at any time during this agreement or 60 days thereafter the owner sells the property to anyone whether ever contacted by Mrs. Eagleson or not that he would

have to pay the commission, and it is my understanding that it is the Court's responsibility to interpret this contract of employment. Now, if the Court interprets the contract that way the Court would have to practically instruct a verdict for the plaintiff because it is admitted here that the sale was made within a 60-day extension, certainly, of any existing contract. However, Your Honor, it is not denied—there is no proof and it is admitted by the plaintiff in this action—that she in no way ever at any time assisted in the sale to Pickering—in any way. And there is no shred of evidence that can ever connect Pickering with the Eagleson agency at all.

Now, it is obvious, Your Honor, that the defendant here did negotiate with Pickering for a sale of this property contingent upon the failure of the agency to make a sale. "If the agents failed to make a sale then," he says, "I will make a deal with you."

Now, it is our interpretation, Your Honor, that unless there can be shown some inducement or connection between the agency and the purchaser that she would not be entitled to any Commission and we fail to see where there is any evidence to go to the jury in view of Mrs. Eagleson's own statement that she never at any time—not only she didn't induce Mr. Pickering in any way but she didn't induce anybody else to even make an offer. How she can now claim, in view of the contract which makes particular reference to a sale being made without her inducement, how she can say now I am

entitled to a commission whether I had anything to do with it or not.

Now, there is only one question, Your Honor, that in my opinion could go to the jury in this case and I don't think that that is sufficient and that would be the question as to whether or not this sale was made prior to May the 1st. We have overwhelming evidence—we have a notary public seal on the instrument, we have the statement that the money wasn't even transferred, which isn't refuted, never even got here until after the 1st.

There was an agreement, true, which is admitted by all of the parties, there was an agreement, but that agreement was contingent upon the agent's authority to make a sale. Now, if counsel is correct in his contention, Your Honor, on the 25th day of June, for example, any one could have walked into Mr. White's place of business and said, "Is this place for sale?" [169] and White said, "What will you give me for it; I am going to leave the Territory," and the man said, "I will give you \$25,000 cash for it," "You have got it," and he writes him a check, Mrs. Eagleson could have claimed \$2,500 commission under the proposed instructions which were sent to the bench by Mr. Kay. I am satisfied, Your Honor, that that is not the interpretation of this contract. I don't see how it can be so stated when in view of that paragraph—the last paragraph of the last authorization to sell which I have read to Your Honor and which you have before you—which specifically states that if he pays after that 60-day extension it must be to someone whom the

plaintiff procured or induced to purchase the property.

The Court: Isn't the word that is used "negotiated"?

Mr. Renfrew: "To parties with whom said agent negotiated during the time of the authorization to sell." Your Honor is correct. I am quoting authorities when I said procuring. But Mrs. Eagleson testified on the stand that she never at any time negotiated with Mr. Pickering in any manner, shape or form.

The Court: Well, suppose it is argued that she didn't negotiate with him because of what the defendant told her?

Mr. Renfrew: Supposing that it is argued to that extent, Your Honor, she can't get up here and say that because the agent told me not to I didn't do something or because the [170] principal told me something I didn't do something.

The Court: She could argue further that it was not in good faith and done for the purpose of evading the payment of the commission.

Mr. Renfrew: But, Your Honor, it is further contended in this contract that she must be the producing party and there is not a shred of evidence here that Pickering ever heard of this place being for sale until after he was working there, never had any intentions of buying it and then only negotiated with the owner with the explicit understanding that the properties were listed with an agent whom he didn't choose to consult with knowing that

it could be sold by the agent up until the time of the expiration of the agent's agreement.

Now, certainly, we can't say that Mr. Pickering couldn't buy that property without consulting the agent, if he waited until after the expiration. He doesn't have to appear there.

Now, I am not just talking to hear myself heard, Your Honor, there are innumerable authorities following that rule and I have——

The Court: But it seems to me that the crux of the case is whether or not this transaction with the Witness Pickering did not amount to a sale or a contract of sale so as to bring it within that particular provision of the contract.

Mr. Renfrew: You mean that the question which I raised a moment ago that if the sale was tantamount to a sale being [171] made on the 21st or 22nd or 23rd of April? Now, I take this position, Your Honor, if the Court is considering an instruction along that line the Court in my opinion would have to go further and instruct that if Mr. Pickering understood that this place was listed and agreed that he had no valid right there until after May the 1st, which he has testified to, and, if, in fact, the consideration was not handed over until that time there could be no sale.

The Court: The Court doesn't instruct in that manner; that is, the Court doesn't pretend or attempt to recite the testimony or the salient fact. That is not a proper way to instruct.

Mr. Renfrew: I am reading the instruction of counsel.

The Court: The Court would have to probably submit the question to the Jury with the instruction that if they found it constituted a sale they then could find one way if not the other way but not attempt to recite any facts or circumstances.

Mr. Renfrew: By the same token Your Honor has raised a question, you have asked whether or not there was not a sale on the 20th—we will say, take a figure, 23rd of April—I will ask whether Your Honor, whether or not Mr. Pickering could not bring an action for specific performance when he knew that the agent had the exclusive right when he did not have the consideration and when he agreed that the papers [172] and the sale would not be consummated until after the expiration of that date, which aren't borne out—only by his testimony—but are borne out by the actual instrument of sale itself which was dated May 1st and executed before a notary public on that date or the date thereafter, May 2nd?

The Court: That is one way of putting it but don't forget that there is sufficient testimony here that would warrant the jury in drawing the opposite inference. There is enough testimony here so that it would have to be submitted to the jury for their determination.

Mr. Renfrew: For the purpose of the record I wish to call to the Court's attention 20 A.L.R., a case entitled Sunnyside Land & Investment Company v. John D. Bernier and Wife, Respondents. It is found at page 1261. It is on appeal from the Washington Supreme Court.

The Court: But hasn't the Washington Supreme Court laid down a different rule than the rule that obtains in every other?

Mr. Renfrew: In every other jurisdiction?

The Court: Yes.

Mr. Renfrew: That doesn't seem to be apparent from the reasoning.

The Court: It is not apparent from the reasoning in one case, but that seems to be the fact if I read some of these annotations correctly that Washington stands alone. [173]

Mr. Renfrew: In this particular case, Your Honor, Washington says that they are following the majority rule and they set forth innumerable cases which they followed on the point which decided the case on which is practically identical with the case which we have here. There is a question in the case over the point of the word——

The Court: I think if I recall correctly that in Washington they do not distinguish between an exclusive agency and an exclusive right to sell.

Mr. Renfrew: That point was raised in this case, Your Honor, and the Court very emphatically stated that they couldn't see the difference; they recognized the rule of the exclusive agency but they followed the majority rule. Counsel for the appellant attempted to make a differentiation between the exclusive right to sell and the exclusive agency but the Court couldn't see any differentiation in it.

Now, that is my reading of the case. But regardless of that I would like to have Your Honor look

at that case. I don't care whether you look at it now or look at it later.

The Court: The Court tried to look at it last night but someone ran off with the books.

Mr. Renfrew: Well, I did it, Your Honor. In view of the Court's ruling on the motion I would like to ask for a short recess so that Mr. Kay and I might meet with Your Honor in Chambers to get some idea as to how we might argue on this [174] contract in view of our not knowing what the Court's instructions are going to be.

The Court: Suppose we take a recess until two and you come into chambers say 15 minutes to two.

Mr. Renfrew: That is all right, if that is all right with Your Honor. I think we could have this case over with by three if we could argue this morning. I would like to keep going on it myself if Mr. Kay would. I have some other things to do.

The Court: Well, Counsel have handed me a lot of instructions here at the last minute and in order to do more than merely glance over them I have to have a little time myself.

Mr. Kay: I would prefer to wait until two to argue, Your Honor. I will waive reporting.

Mr. Renfrew: Yes.

The Court: Ladies and Gentlemen of the Jury, we are about to recess the case until two p.m., at which time you should be in the jury box. The Court will now be in recess until two p.m.

(Whereupon, at 11:30 a.m., Tuesday, February 21, 1950, the taking of testimony was concluded.) [175]

FEBRUARY 23, 1950

The Court: You may call the roll of the jury.

(Jurors' names were called and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Ladies and Gentlemen of the Jury, we have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

When you were accepted as jurors in this case you obligated yourselves by your oaths to well and truly try the matter in issue between the plaintiff and the defendants, and a true verdict render according to the law and the evidence as given to you on the trial. That oath means that you will not be swayed by passion, sympathy or prejudice, and that your verdict will be the result of a careful consideration of all the evidence and the instructions of the Court as to the law.

Neither the statements of counsel engaged in the trial of this case, nor the allegations of the pleadings, except so far as they constitute admissions, are to be considered by you as proof of the facts to which they relate. You should not regard or consider the relative financial condition of the parties to the suit, nor the effect of your verdict upon the parties, or any of them, or attempt to arrive at a verdict based upon your individual or collective opinions as to the abstract principles of justice which should govern the case.

It is not for you to say what the law is or should be regardless of any idea you may have in that

respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

II.

By this action plaintiff seeks to recover damages in the sum of \$3500 for an alleged breach of contract as a real estate broker. She alleges in her complaint that on July 7, 1948, she was employed by the defendants to sell the L. W. Chocolate Shop in Anchorage for \$45,000 upon which her commission would be 10%; that subsequently the contract was extended to April 30, 1949, and that in April, the plaintiff was instrumental in obtaining a purchaser to whom the defendants, in April, the exact date being unknown to plaintiff, sold the property listed with her for \$35,000.

The defendants deny that plaintiff was instrumental in procuring a purchaser and allege that the sale was negotiated by them after the contract with plaintiff had expired, and that the contract was not extended by the defendant Erma R. White.

The burden of proving by a preponderance of the

evidence that plaintiff was instrumental in promoting a purchase by Pickering is upon the plaintiff.

The principal question for your determination is whether the property was sold during the life of the contract or any valid extension thereof.

III.

Under the contract between the parties, plaintiff's Exhibit No. 1, the plaintiff was given the exclusive right to sell the property described in the complaint for 60 days and, if the extension was valid, for the further period ending April 30, 1949, with the right to receive the commission agreed upon if the defendants sold the property during the life of the contract, or if they sold the property within 60 days after April 30, 1949, to any person with whom the plaintiff had negotiated prior to April 30, 1949.

Defendants contend that the extension referred to was not authorized or ratified by the defendant Erma R. White and that consequently neither she nor the partnership is bound by such extension.

You are instructed that authorization or ratification by a partner may be shown by direct evidence, as by acts or written or spoken words, or it may be inferred from the surrounding facts and circumstances. It is for you to say whether there are any facts or circumstances from which authorization or ratification by the defendant Erma R. White may be inferred. In determining this question you may take into consideration the fact that the contract with plaintiff, Exhibit No. 1, was executed by both defendants, the relations between them in the conduct of their business, the fact that the property

in question was sold by them shortly thereafter, and all the other facts and circumstances.

However, before you would be warranted in inferring ratification on the part of the defendant Erma R. White, it would have to appear by a preponderance of the evidence that she knew of the extension and had an opportunity to repudiate it, and that the situation was such that she was obliged to speak if she did not consent rather than remain silent.

If you find that the defendant Erma R. White did not authorize or ratify the extension referred to, then neither she nor the partnership would be liable, but the defendant Lawrence A. White would be personally liable to the same extent as the partnership would be if the extension had been granted by both partners.

IV.

It is contended by the plaintiff that the property was actually sold before April 30th to Pickering, but that the transaction was given the appearance of a sale after that date and, moreover, that she was dissuaded from negotiating with Pickering and that these acts were done by the defendants for the purpose of defrauding her of the commission.

Defendants contend that it was a bona fide sale which was not consummated until after April 30th, that their dealings with Pickering were open and aboveboard, and that so far as dissuading her is concerned, all they did was to lay before her the facts about Pickering.

You are instructed that the law requires the

utmost good faith on the part of the principal toward his agent. Each owes to the other the duty of performance according to the terms of their agreement.

In this connection, you are instructed that if you find from a preponderance of the evidence that at any time before April 30, 1949, Pickering agreed to buy and the defendants agreed to sell the property in question, and find that such agreement was unconditional and not contingent on the sale of the property by the plaintiff in the meantime, and further find that the formal execution of the sales contract, Plaintiff's Exhibit No. 2, was deferred to May 1, 1949, for the purpose of defrauding the plaintiff of her commission, you should find for the plaintiff in the sum of \$3500. On the other hand, if you do not so find, your verdict should be for the defendants.

You are also instructed that if you find that the plaintiff would have negotiated with said Pickering but for the acts or conduct, if any, of defendant, Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date.

V.

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, and under that rule he is required to prove such issue by a preponderance of the evidence. By the preponderance of the evi-

dence is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue, you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it.

VI.

Subject to the law as contained in these instructions, you are also the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence, except such evidence as is declared by the Court to be conclusive.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence; that the oral admissions of a party should be viewed with caution; that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, there-

fore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

Before reaching a verdict you will carefully consider and compare all the testimony. In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same way as you would decide whether to believe something told you out of court. You size up the witness in court in the same way as an informant out of court, observe his appearance and demeanor, note his intelligence, whether he is candid and fair, whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to observe or learn or remember the truth, the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, and the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on the witness' credibility and the weight of his testimony. When a witness has a strong personal interest in the outcome of a case, the temptation to lie, or to color, distort or withhold the truth may likewise be strong. Notwithstanding that, however, you may find that he has told the truth.

What has just been said concerning interest in the outcome of a case is likewise applicable to bias

or prejudice against or disposition to favor, either party. In other words, you should bring to bear upon your consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which you, as reasonable human beings, have and exercise in every day affairs of life.

Accordingly, you should draw from the evidence in this case all deductions which appear to you to flow logically from such evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for proof of any fact in this case. A witness wilfully false in one part of his testimony may be distrusted in other parts. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are also instructed that the opening statements and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal

to your reason and judgment, and are not in conflict with the law as set forth in these instructions.

VII.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction and consider it by itself or separately from or to the exclusion of all the other instructions.

As you have been heretofore instructed, your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

VIII.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conviction, founded upon the law and the evidence of the case, merely to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity or personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the

view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.

Accordingly, no juror should hesitate to change the opinion he has entertained, or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

IX.

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room the exhibits and these instructions, together with three forms of verdict.

If you agree upon a verdict during business hours, that is, between 9 a.m. and 5 p.m., you may have your foreman date and sign it and then return it into open court in the presence of the entire jury, together with these instructions and the unused forms of verdict. If, however, you agree upon a verdict after business hours, that is, after 5 p.m. one day and 9 a.m. the following day, you should similarly have your foreman date and sign it and seal it in the envelope accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the court next convenes at 10 a.m. when the verdict will be received from you in the usual way.

Given at Anchorage, Alaska, this 23rd day of

February, 1950, and I have signed it as District Judge.

The Court: Any exceptions?

Mr. Renfrew: Before I make any formal objections, do you think this should be inserted on this one here, after that comma? The way this reads now—I know that is what you mean to say “* * * agreed to buy and the defendants agree to sell the property in question * * *,” that such agreement was unconditional; in other words, they can read that to take it if they find that they did agree, then such an agreement was unconditional, that would result. I know that isn’t what you intend to say.

The Court: This is just for the purpose of clarifying it.

Mr. Renfrew: Yes, it all—I know you intended to say that they also must find there that the agreement was conditional and not contingent upon the sale of the contract.

The Court: Suppose I just put the word “and” there?

Mr. Renfrew: And why do you say “further find” down here? Why not say “and if you find”?

The Court: All right.

Mr. Kay: Just the words “and find”?

The Court: “The property in question and find that.” What is the other?

Mr. Renfrew: I wish to make a formal objection to that portion of Instruction No. 4 commencing with line 28 wherein the paragraph starts “You are also instructed that *if find* the plaintiff would have negotiated with said Pickering but for the acts or

conduct, if any, of defendant, Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date." for the reason that:

(1) That is not the law; and

(2) That there is insufficient evidence to warrant such an instruction.

The Court: The only question in my mind is not a question of law. As I indicated in Chambers I am not entirely satisfied that the evidence might justify——

Mr. Renfrew: That is going too far. I don't think there is any doubt upon when you say acts or conduct—in other words, if any. In other words is failure to tell them that it would be his act or conduct and I can't see any duty upon a man to run down a real estate agent and say, "I want to give you——"

The Court: I think it is plain enough that the acts would have to be affirmative in character.

Mr. Renfrew: It doesn't say so in that instruction.

The Court: I don't see how it could be understood otherwise; from the very nature of the question it would have to be that.

Mr. Kay: Any further objections?

Mr. Renfrew: No, those are the only objections I have.

Mr. Kay: I don't really have any formal objections, but I do wonder whether or not—Instruction

2. I think that is what you refer to when you say you are not offering any amendment.

The Court: Reading——

Mr. Kay: Is that what was said in the paragraph?

The Court: The only thing I suggested in terms of the contract——

Mr. Kay: ——to purchase. This is in obtaining a purchaser if it was instrumental in bringing about the purchase, something like that, I wouldn't have any objection because there is a different——

The Court: I thought you were going to amend but you never did. All I am intending to do in this Instruction is to re-summarize the pleadings in order to simplify the thing for the Jury rather than to send the pleadings in to them. It hasn't been my practice to ever send the pleadings into the Jury, at least where the pleadings are prolific. The Jury would be completely confused, so I attempt to summarize the pleadings that are relative to the case and I don't see how I could avoid——

Mr. Kay: The only thing is, I wonder if "instrumental in procuring the purchaser" means the same thing as "instrumental in bringing about a purchase"? I say that we were instrumental in obtaining him to purchase not in obtaining but instrumental in bringing about the purchase by him.

The Court: Then you think it ought to be "instrumental"?

Mr. Kay: In——

The Court: In obtaining——

Mr. Kay: In bringing about the sale.

The Court: Well, you say in obtaining.

Mr. Renfrew: You are amending my pleadings because the defendants deny that the plaintiff was instrumental in obtaining a purchaser.

Mr. Kay: I am not asking for any change in that; I am just saying that the burden of proving by a preponderance of the evidence that the plaintiff was instrumental in bringing about a purchase or in obtaining the final sale but I have not alleged that we were instrumental in procuring Pickering. I don't say we met Pickering and brought him down there; I say we were instrumental in bringing about the sale.

Mr. Renfrew: Instrumental in obtaining——.

Mr. Kay: In other words, in bringing about the final sale to Pickering.

Mr. Renfrew: Plaintiff was instrumental in—you have got obtaining Pickering to purchase and here he has got instrumental in procuring a purchaser.

Mr. Kay: Maybe I am not making myself clear.

Mr. Renfrew: In the pleadings you say, "Plaintiff was instrumental in obtaining Pickering to purchase said property," and the Judge has said here the burden of proving by a preponderance of the evidence that the plaintiff was instrumental in obtaining a purchaser."

Mr. Kay: There is a difference. Under this the plaintiff was instrumental in obtaining Pickering to purchase. In other words, it did something by which Pickering purchased but I don't claim that we procured Pickering there.

The Court: Suppose I said "in promoting a purchase"?

Mr. Kay: That would be better.

The Court: In promoting a purchase.

Mr. Kay: Is upon the plaintiff.

Mr. Renfrew: By Pickering.

The Court: Yes.

Mr. Kay: That is right in promoting a purchase by the defendant.

I have no further objections.

The Court: Ladies and Gentlemen of the Jury, in Instruction No. 2 you will see a few corrections made in pen and ink in a paragraph that will now read:

"The burden of proving by a preponderance of the evidence that plaintiff was instrumental in promoting a purchase by Pickering is upon the plaintiff."

You will see what the correction is and that, of course, governs rather than the way that it was first read to you.

The bailiffs may now be sworn.

(Oaths administered by Clerk.)

The Court: The Jury may now retire to the Jury Room to deliberate on a verdict in charge of the bailiffs.

(Whereupon, at 11:00 a.m., Thursday, February 23, 1950, the Jury retired to deliberate upon a verdict.)

United States of America,
Territory of Alaska—ss.

I, Oren J. Casey, the Official Court Shorthand Reporter for the District Court of the United States, Third Division, Territory of Alaska, hereby certify the above and foregoing to be a true and correct transcript of the proceedings had in the above-entitled matter in said court at the time and place as set forth.

/s/ OREN J. CASEY,
Certified Shorthand Reporter.

[Endorsed]: Filed June 2, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, M. E. S. Brunelle, Clerk of the above entitled Court, Do Hereby Certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and pursuant to designation of counsel, I am transmitting herewith the entire original papers in my office dealing with the above entitled action or proceeding, and including specifically the reporter's transcript of the evidence introduced on the trial of the cause and all exhibits introduced on behalf of both parties to the

action, such record being the complete record of the cause pursuant to the designation filed herein.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above entitled cause by the above entitled Court on February 2, 1950, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: No. 12592. United States Court of Appeals for the Ninth Circuit. Lawrence A. White and Erma R. White, Appellants. vs. Clara M. Eagleson, Appellee. Transcript of Record. Appeals from the District Court for the Territory of Alaska Third Division.

Filed June 28, 1950.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12592

LAWRENCE A. WHITE and ERMA R. WHITE,
Appellants,

vs.

CLARA M. EAGLESON,
Appellee.

STIPULATION CONCERNING PRINTING OF RECORD

It is hereby stipulated and agreed by and between Davis & Renfrew, attorneys for the appellants, and Cuddy & Kay, attorneys for the appellee, that the entire record in the above entitled matter as submitted to the Court of Appeals by the District Court for the Territory of Alaska, Third Division, including reporter's transcript of evidence and all exhibits offered by both parties, and together with this stipulation and together with appellant's designation of points, if not included in the records sent forward by the Clerk of the District Court, shall be printed except those certain portions hereinafter particularly set forth, which portions are not deemed by the parties to be material to the determination of the questions raised by the appeal in this matter, and may be omitted from the printed record by the above entitled Court as follows:

1. Printed paper entitled "Judgment Roll."
2. Summons directed to the defendants.
3. Writ of Attachment filed November 4, 1949.
4. Notice of Attachment with return by the Bank of Alaska.
5. Notice of Attachment without any return.
6. Notice of Attachment returned with the service on Mr. Pickering.
7. Affidavit of Attachment.
8. Order concerning the setting of the case for trial.
9. Minute Order dated February 8, 1950, setting the cause for trial.
10. Writ of Attachment filed December 28, 1949.
11. Subpoena directed to Mr. Pickering.
12. Minute Order dated February 20, 1950, having to do with the selection of the jury.
13. Roll of jurors.
14. Verdict number two, not signed.
15. Verdict number three, not signed.
16. Stipulation of parties concerning supersedeas bond.
17. Supersedeas Bond.

Dated at Anchorage, Alaska, this 31st day of October, 1950.

DAVIS & RENFREW,
Attorneys for Defendants-
Appellants,

By /s/ EDWARD V. DAVIS.

CUDDY & KAY,
Attorneys for Plaintiff-
Appellee,

By /s/ WENDELL P. KAY.

[Endorsed]: Filed November 4, 1950.

No. 12,592

IN THE

United States Court of Appeals
For the Ninth Circuit

LAWRENCE A. WHITE and ERMA R.

WHITE,

Appellants,

VS.

CLARA M. EAGLESON,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

BRIEF FOR APPELLANTS.

FILED

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Subject Index

	Page
Statement relating to pleading and jurisdiction.....	1
Statement of the case	4
Specifications of error	11
Summary of argument	15
Argument	17
1. Defendants' motion for summary judgment should have been granted	17
2. Defendants' motion for judgment and for directed verdict made at the close of plaintiff's case should have been granted	19
3. Motion made by defendants for directed verdict and for judgment at the close of all the evidence should have been granted	23
4. Plaintiff was not entitled to change the theory of the case after the close of the evidence	25
5. Plaintiff was not entitled to recover under any theory	28
6. Instruction No. 4 given by the court was not justified	34
7. The court should have granted defendants' motion for judgment notwithstanding the verdict	36
8. Plaintiff, if entitled to recover at all, should be limited to the sum of \$2,000 according to her testimony concerning a modified agreement	36

Table of Authorities Cited

Cases

	Page
Crowe v. Trickey, 204 U.S. 228	22

Statutes

Alaska Compiled Laws Annotated, 1949, 53-1-1	2
Alaska Compiled Laws Annotated, 1949, 55-5-18	18
Alaska Compiled Laws Annotated, 1949, 55-5-61	18
Alaska Compiled Laws Annotated, 1949, 55-5-63	19
Alaska Compiled Laws Annotated, 1949, 55-5-73	27
Alaska Compiled Laws Annotated, 1949, 55-7-3	27
New Title 28 U.S.C., Sections 1291 and 1294.....	2
63 Stat. 445	2
48 U.S.C., Sections 101 and 103a	2

Rules

Federal Rules of Civil Procedure, Rule 50.....	35
Uniform Rules of the District Court for the Territory of Alaska, Rule 15	19

Texts

8 Am. Jur., Brokers:	
Section 18, page 999	33
Section 168, page 1084	22
Section 172, pages 1087, 1088	23
Section 176, page 1092	23
Section 189, page 1100	23
12 Am. Jur., Contracts:	
Section 241, pages 772, 773	33
Section 252, page 795	33
41 Am. Jur., Pleading:	
Section 374, page 550	27
Section 381, pages 555, 556	28
Section 382, pages 556, 557	28

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Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

BRIEF FOR APPELLANTS.

I.

**STATEMENT RELATING TO PLEADING AND
JURISDICTION.**

This is an appeal from a final judgment rendered by the District Court for the Territory of Alaska, Third Division, on February 27, 1950. The judgment was in the amount of Thirty-five Hundred Dollars (\$3500.00), plus interest, costs, disbursements, and attorney's fees in favor of the plaintiff, appellee herein, and against defendants, appellants herein (R. 40-41).

The District Court for the Territory of Alaska is a court of general jurisdiction consisting of four divisions, of which the Third Division is one.

Jurisdiction of the District Court in the matter is conferred by Title 48 U.S.C., Sec. 101. See also Alaska Compiled Laws Annotated, 1949, 53-1-1.

Jurisdiction of this Court to review the judgment of the District Court is conferred by New Title 28 U.S.C., Sections 1291 and 1294.

Practice in the District Court until July 18, 1949, was controlled by A.C.L.A., 1949. Under date of July 18, 1949, the Federal Rules of Civil Procedure were extended to the District Courts for Alaska and such rules have governed the practice of those courts since that time. 63 Stat. 445, 48 U.S.C. 103a.

This action was commenced by the filing of plaintiff's complaint on May 6, 1949 (R. 7). The complaint in brief alleged that plaintiff at all times mentioned was a licensed real estate broker, that defendants employed plaintiff to procure a purchaser for a certain business on a ten per cent (10%) commission of the selling price, that the employment agreement was extended to April 30, 1949, that plaintiff was instrumental in "procuring one John Doe Pinkering to purchase the property," that the sale was made for \$35,000, that by such sale plaintiff became entitled to a commission of \$3,500 which has not been paid (R. 3-5). As originally filed, the complaint alleged the sale price at \$45,000, the commission at \$4,500, and that the sale was made in March, 1949. These allegations were changed upon plaintiff's motion to amend

made during the trial to read as they are in the record (R. 15-16, 160, 166). A copy of the "authorization to sell" which is the basis of the action, was attached to the complaint, marked Exhibit "A" (R. 5-7) (This is the same as plaintiff's Exhibit I. R. 66-68).

Defendants filed separate answers. Both admitted that plaintiff was a real estate broker, that she was employed to procure a purchaser for the property, and that the commission was to be ten per cent (10%) upon the selling price. Both defendants denied that plaintiff was instrumental in procuring the sale or that any commission became due to plaintiff. Defendant Lawrence White alleged that the employment agreement was not extended for or on behalf of Erma White, and Erma White alleged that the agreement had expired as to her in September of 1948. Both defendants admitted that defendants had paid no money to plaintiff. Both defendants affirmatively alleged that plaintiff was not instrumental in any manner in interesting the buyer in purchasing the property, that the purchase was consummated by direct negotiation between the seller and buyer after expiration of the authorization and without any effort on behalf of plaintiff therein (R. 7-12). The answers were filed on June 16, 1949.

No motions were directed to the answers and no reply was filed.

With the exception of the amendments to the complaint above noted, no amendments to the pleadings were asked or granted and the matter was tried on the issues framed by the complaint and the answers.

II.

STATEMENT OF THE CASE.

In the month of July, 1948, Clara M. Eagleson, plaintiff and appellee, was engaged in the real estate business at Anchorage, Alaska, and was a regularly licensed real estate broker (Admissions in Answers, R. 7, 10). At that time Carl T. Rentschler was working with appellee as her agent (R. 63, 77). At the same time defendants Lawrence A. White and Erma R. White were husband and wife and the owners of a certain business conducted in Anchorage and known as the L. W. Chocolate Shop.

In July of 1948 Mr. Rentschler had certain discussions with Mr. White which resulted in the signing by Mr. and Mrs. White, on July 7, 1948, of an authorization for the Eagleson Agency to sell such business (R. 64). That authorization to sell is the basis of this action and a copy of it is attached to plaintiff's complaint, marked Exhibit "A" (R. 5-7) and the original of it is in evidence at plaintiff's Exhibit 1 (R. 66-68). Execution of the document by defendants is admitted in the answers.

Rentschler handled the entire negotiations leading up to the signing of the authorization to sell above mentioned (R. 77). Acting as agent for Mrs. Eagleson, he wrote the document and prepared it (R. 75, 77).

The authorization expired by its own terms on September 8, 1948. On or about April 8, 1949, Mr. Rentschler contacted White and informed White that he had several interested parties to buy the property

and would like a contract extension (R. 69, 79, 80) and Mr. White granted an extension to April 30, 1949 (R. 80, 81). At that time Mr. White signed his initials to the original authorization after the words "Extension until 4/30/49" as will appear from the original document (R. 68).

No one from the Eagleson Agency ever at any time procured a prospect who made any offer to purchase the business (R. 80, 84, 146, 147, 153, 158, 161, 184). The agency was unable to arrange any sale (R. 81). The closest the agency ever came to making a sale was in negotiating with a Mr. Urand, who refused to pay the asking price of \$45,000 and said he would not even pay \$40,000, and in fact refused to make any offer at all. This party reportedly had available the sum of \$4,000 as a down payment and apparently asked Mrs. Eagleson to get White to make an offer (R. 150, 151, 152, 153, 166). White refused to make an offer to Urand because the down payment of \$4,000 available was too small (R. 166).

About March 10, 1949, Herbert E. Pickering came down from Fairbanks and worked in the Chocolate Shop under an arrangement where he would trade services in exchange for learning the candy business and that arrangement continued until Pickering purchased the subject business on May 1, 1949 (R. 168, 169). Sometime in April, 1949, and between April 1 and April 15, Pickering discussed with White the possibility of purchasing the property (R. 171). He knew the place was for sale and knew it was listed with an agency but not what agency (R. 169, 176).

Pickering testified that on one occasion he saw Rentschler bring in a prospect. He didn't know the man's name but he was a tall man. Pickering was busy making candy and knows nothing of the conversation or of what took place. This was prior to Easter, 1949 (R. 169, 170) (Reference to the calendar shows that Easter in 1949 was on April 17).

Pickering preferred to deal with White directly and saw no need for dealing with a real estate agency (R. 179).

Shortly after Pickering first discussed with White the purchase of the property, the parties came to an agreement as to price and as to terms of payment. The only price discussed was \$35,000 and there was no haggling over price (R. 172). The discussions between Mr. White and Mr. Pickering were made with the specific understanding that the real estate agency had first right to sell the property through April 30th, and that if it consummated a sale prior to that time Pickering would not be entitled to buy.

The agreement between White and Pickering as to price and as to terms was made contingent upon a prior sale not being made by the real estate agency. Any agreement between White and Pickering was likewise made subject to Pickering's being able to raise the down payment of \$6,000 by May 1 (R. 171, 172, 173, 174, 175, 176, 179, 198). Pickering wanted the business, but it was his understanding that he couldn't purchase it if the agency produced a buyer prior to May 1, and Pickering had made other plans

in the event someone else bought the place (R. 179, 180). Mr. Pickering was not able to liquidate his assets completely prior to May 1 and actually raised the last \$1,000 of the down payment on the afternoon of that date (R. 175).

The agency failed to procure a buyer prior to May 1, the balance of Pickering's funds necessary to make the down payment came through on May 1, and the parties executed the contract of sale on May 1 (R. 169, 178-180). The contract was acknowledged on May 2, 1949, before a notary and a copy of such agreement is in evidence as plaintiff's Exhibit 2 (R. 113-122).

White himself told Mrs. Eagleson of Mr. Pickering and that Pickering was interested in purchasing the property (R. 141, 153, 154, 183, 198). Mr. Rentschler also was advised that Pickering was interested in purchasing the property and he believes he had such knowledge as early as April 8 or about that date (R. 80).

Neither Rentschler nor Mrs. Eagleson nor anyone else connected with the Eagleson agency ever had any dealings with Pickering. He didn't know any of them (R. 169). None of them had any conversation with him or attempted to contact him (R. 80, 153).

Mr. Rentschler and Mrs. Eagleson maintain that they didn't contact Pickering because White told them not to as Pickering had an aversion to real estate agents (R. 71, 73, 80, 141, 153). White testified that he did not tell them or either of them not to contact

Pickering (R. 200, 201). White testified that he told Mrs. Eagleson that Pickering wouldn't come to see her and do business with a real estate agency because he couldn't afford to pay that much money, but that he, White, was perfectly willing that Mrs. Eagleson should attempt to deal with Pickering if Pickering would go to her (R. 200, 201).

Apparently sometime in the month of April Rentschler and Mrs. Eagleson heard some rumors that White had sold the business and both claim to have talked to White about it.

Rentschler said his first conversation with White on that subject was about April 20 and Rentschler asked White if he had sold the business. White said "No," and Rentschler claims he asked White to contact Mrs. Eagleson (R. 90, 96). He claims to have had a second conversation with White about the claimed sale somewhere about April 30, 1949, and upon cross-examination fixed the time as between April 25 and May 4 (R. 92). He fixes the time as being the day before White left Anchorage (R. 91, 94), and as the day before White was served with Summons in this action (R. 91).

White acknowledged the agreement with Pickering at Anchorage on May 2, 1949, and was personally served with Summons in this action at Anchorage sometime subsequent to the filing of the complaint, which took place on May 6, 1949.

In that second conversation, Rentschler claims that he told White that he, Rentschler, understood the

business had been sold and suggested White should go to the office and "square up on the commission," and that White said "No." Then he claims to have told White, "You realize you are obligated to, don't you?" and White said "No" (R. 94, 95, 96).

Mrs. Eagleson claims that White contacted her about April 23 and she told him she heard the business had been sold. White denied it (R. 140). At that time, apparently, White told her about Pickering. She says that White told her Pickering's price was \$30,000 and that he, White, couldn't pay a commission at that price. Then she claims that she offered to accept \$2,000 as her full commission to be paid if White could get Pickering to go above the \$30,000 figure and that White agreed to pay commission on that basis (R. 141, 154). She maintains that White told her at that time that he had sold the property to Pickering (R. 156), but on cross-examination it appears that she claims White told her that Pickering had made him an offer of \$30,000 which he would be obligated to take if he couldn't get a better offer (R. 157-158) and she never was able to get an offer of even \$30,000 (R. 163).

The Whites didn't pay any commission and this action resulted.

The cause was tried February 20, February 21, and February 23, 1950.

After statement of the case on behalf of the respective parties, plaintiff called the defendant, Law-

rence White, as her first witness. White testified that the property was sold May 2, 1949, for \$35,000, \$6,000 down, the balance to be paid according to the terms of a conditional sales contract held in escrow at the Bank of Alaska (R. 58-59).

At the close of White's testimony, defendants moved for summary judgment on the ground that plaintiff had not replied to affirmative matter contained in the answers and that upon the testimony of plaintiff's witness, Lawrence White, the sale was made on May 2, 1949, after the expiration of the agreement. The motion was denied (R. 13, 59-62).

Carl T. Rentschler, Wendell Dayton, Oliver J. Easley, Rodney L. Johnston and Clara M. Eagleson testified on behalf of plaintiff in addition to Lawrence A. White, as above set forth.

At the close of plaintiff's evidence defendants moved for a directed verdict in their favor and for judgment on the pleadings for defendants and those motions were denied (R. 16, 167).

Defendants called Herbert E. Pickering and Lawrence A. White as witnesses on behalf of defendants.

At the close of all the evidence defendants moved for judgment or for directed verdict for defendants on the ground that plaintiff had failed to prove her case as laid (R. 17, 202). That motion was denied (R. 17).

Each party presented proposed instructions and they are set out in full in the record (R. 19-28).

The matter was argued to the jury and the Court instructed the jury and the respective parties took exception to the Court's action in relation to instructions. The Court's instructions as given are found at pages 28 through 38 and at pages 211 through 221 of the record.

The jury returned its verdict in favor of the plaintiff on February 24, 1950 (R. 39). Judgment following the verdict was entered February 27, 1950 (R. 40-41).

Defendants, on March 6, 1950, filed motion for judgment notwithstanding the verdict and motion for new trial (R. 42-45) and these motions were denied on April 10, 1950 (R. 47). This appeal followed.

III.

SPECIFICATIONS OF ERROR.

Appellants respectfully submit that the trial Court erred as is hereinafter more fully set out and that each of such errors was substantial and that the results of those errors were prejudicial to the defendants, appellants herein, as follows:

1. That the trial Court erred in denying defendants' motion for summary judgment made at the close of the testimony of plaintiff's first witness (R. 13, 59-62) in that, as will appear from the answers of the respective defendants (R. 7-12) such answers contained new matter constituting a defense to plaintiff's alleged cause of action, and in that no reply was filed by the plain-

tiff under the practice then prevailing, and in that it affirmatively appeared from the testimony of such witness that the new matter contained in the answer was true.

2. That the trial Court erred in denying defendants' motions for judgment on the pleadings and for directed verdict for defendants made at the close of plaintiff's case (R. 16, 167) for the reason that, as will appear from the record, plaintiff failed to prove her case, and considering all plaintiff's evidence, there was no substantial evidence in support of a judgment in favor of plaintiff and against defendants.

3. That the trial Court erred in denying defendants' motions for directed verdict for defendants and for judgment made at the close of all of the evidence (R. 17, 202) for the reason that plaintiff failed to prove her case in that upon consideration of all the evidence, including the exhibits, there was no substantial evidence to authorize a verdict in favor of plaintiff and against defendants, and in particular that there was no evidence at all that plaintiff was instrumental in obtaining the buyer, as alleged in plaintiff's complaint (R. 4), and in that there was no evidence at all to justify submitting the matter to the jury as to whether plaintiff was entitled to receive a commission of \$3,500 or of any other sum from defendants, or either of them.

4. That the trial Court erred in submitting the matter to the jury at all for the same rea-

sons as are set forth under specifications numbered 1, 2, and 3 above.

5. That the trial Court erred in instructing the jury in Instruction No. IV as follows:

“You are also instructed that if you find that the plaintiff would have negotiated with said Pickering but for the acts or conduct, if any, of defendant, Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date.” (R. 215).

for the reason that such portion of Instruction IV was prejudicial to defendants, not justified by any issue raised by the pleadings, and was not justified by any evidence introduced in the cause. Defendants excepted to such portion of Instruction IV at the trial as follows:

“Mr. Renfrew: I wish to make a formal objection to that portion of Instruction No. 4 commencing with line 28 wherein the paragraph starts ‘You are also instructed that *if find* the plaintiff would have negotiated with said Pickering but for the acts or conduct, if any, of defendant, Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date.’ for the reason that:

- (1) That is not the law; and
- (2) That there is insufficient evidence to warrant such an instruction.” (R. 221-222).

6. That the trial Court erred in accepting the verdict of the jury in that such verdict was not justified by any competent evidence and was against the evidence.

7. That the trial Court erred in entering judgment in favor of the plaintiff and against the defendants (R. 40-41) in the amount of the verdict or at all for the reason that plaintiff failed to prove her case, and that under a proper interpretation of the "Authorization to Sell" (Plaintiff's Exhibit 1, R. 66-68) and under the evidence produced in the cause, plaintiff was not entitled to any judgment against defendants, and defendants were entitled to judgment against plaintiff in accordance with their various motions. That if plaintiff should be entitled to any judgment at all against defendants, such judgment should have been limited to the sum of \$2,000 according to the offer plaintiff claims was made to defendants by plaintiff and accepted by defendants (R. 141, 154).

8. That the trial Court erred in denying defendants' motion for judgment notwithstanding the verdict (R. 42) for the reasons set forth in such motions and as above set forth in specifications No. 1, 2, 3, 5, 6, and 7 above set forth, and it appearing that defendants moved for judgment and for directed verdict at the close of all the evidence.

9. That the trial Court erred in denying defendants' motion for new trial (R. 43-45) for the

reasons set forth in such motion, and for the reasons more particularly set forth in specifications No. 1, 2, 3, 5, 6, and 7 above set forth.

IV.

SUMMARY OF ARGUMENT.

1. The answers included new matters constituting a defense to plaintiff's complaint. Under the practice then existing, such new matter was deemed admitted unless plaintiff filed a reply. No reply was filed. Under the allegations of the pleadings and from the testimony to the time of the motion for summary judgment, it was apparent plaintiff was not entitled to judgment and defendant's motion for summary judgment should have been granted.

2. Plaintiff by her complaint alleged she was the procuring cause of the sale to Pickering. She failed to prove her case and showed that the sale was made by the owner, unaided by plaintiff. Defendants' motion for judgment and for directed verdict, as made at the close of plaintiff's case, should have been granted.

3. Undisputed evidence introduced on behalf of defendants disclosed that the agreement with Pickering made in April, 1949, was made subject to the right of plaintiff to sell the property prior to April 30, 1949, and the sale was not consummated until after that date. Plaintiff had absolutely nothing to do with the sale. Plaintiff on all the evidence failed to show that she procured the sale or was instrumental

therein. Defendants' motions made at the close of all the evidence should have been granted.

4. Plaintiff attempted to change the theory of the case at the end of the case without asking or receiving an amendment of the pleadings. The new theory was completely outside the scope of the issues as framed and amounted to a material variance and a failure of proof. Judgment based on the substituted theory is unauthorized and should be reversed.

5. Proper interpretation of the "authorization to sell" would deny any commission to plaintiff unless she sold the property or was instrumental in procuring the sale. According to the evidence, she did neither. She shouldn't be entitled to recover under any theory.

6. There is no evidence to support the portion of the Court's Instruction No. 4 excepted to by defendants and set out as Specification of Error No. 5, and the "Authorization to Sell" does not justify the giving of such instruction. The trial Court erred in so instructing the jury.

7. The trial Court should have granted defendants' motion for judgment notwithstanding the verdict on the ground that plaintiff had failed to prove her case, and denial of that motion was error.

8. If it be determined that plaintiff was entitled to any commission, she should have been limited in her recovery to the sum of \$2,000 according to the terms of the modified agreement she claims she made with defendant.

V.

ARGUMENT.

Plaintiff in this case by her complaint claimed that she had been employed by defendants to procure a purchaser for the subject business, that the agreement of employment was in effect through April 30, 1949, and that during the months of April, 1949 (March in the original complaint), she was "instrumental in obtaining one John Doe Pinkering to purchase the property," that the property was sold during April for \$35,000 (\$45,000 in the original complaint), and that she was therefore entitled to a ten per cent commission or \$3,500 (\$4,500 in the complaint as filed) (Paragraphs II, IV and V Complaint, R. 3-5).

Defendant by answer admitted that plaintiff was employed to secure a purchaser, denied the other allegations, and alleged new matter to the effect that the agreement with plaintiff had expired before the sale, that plaintiff was not instrumental in any manner in interesting the buyer, that the purchase was consummated by direct negotiations between the buyer and the sellers after expiration of plaintiff's employment and without any effort on behalf of the plaintiff (Answer Paragraphs II, IV, V, R. 7-12).

Plaintiff's attorney, in his opening statement to the jury, reiterated the allegations of the complaint to the effect that the sale was made to a buyer which plaintiff was instrumental in selling and that therefore plaintiff was entitled to her commission (R. 54-56).

Alaskan law, at the time the pleadings were executed and filed, authorized a defendant to move for judgment on the pleadings where the answer contained new matter constituting a defense and where no reply to such new matter was filed.

55-5-61. *Reply: When Permitted.* When the answer contains new matter, constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such new matter in the answer. New matter constituting a "defense" as used herein, shall be deemed to include what at common law were known as matters in abatement.¹

55-5-18. *Admission by failure to deny.* Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purpose of the action, be taken as true; but the allegation of new matter in a reply is to be deemed controverted by the adverse party as upon a direct denial or the avoidance, as the case may require.

¹Alaska Compiled Laws Annotated, herein designated as A.C.L.A., 1949, were not actually published until late in 1949 but the applicable laws so far as here material were the same as the laws contained in the 1933 compilation as amended to 1947. For convenience, they have been cited under the A.C.L.A., 1949, numbering system.

55-5-63. *Motion by defendant for judgment on pleadings: Assessment of damages.* If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law or rule of the court, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages.

By court rule plaintiffs were required to reply, demur, or otherwise move against an answer within five days after its filing or service unless additional time was given by the Court (Rule 15, Uniform Rules of the District Court for the Territory of Alaska, effective March 7, 1947, page 14). No additional time was given here.

Answers were served and filed in this case on June 16, 1949. On July 16, 1949, the Federal Rules of Civil Procedure were extended to the District Courts of Alaska and the courts have held that those rules, since that date, govern procedure in such courts in cases of local jurisdiction as well as those of Federal jurisdiction.

Plaintiff called defendant Lawrence White as her first witness. So far as here material he testified that on May 2, 1949, he sold the subject business to Mr. Pickering (R. 59).

Defendants then moved for summary judgment on the ground that no reply had been filed to the new matter constituting a defense contained in the an-

swers, and that by the testimony of plaintiff's own witness, it affirmatively appeared that the new matter contained in the answer was true and that the sale was made by defendants after the expiration of the listing (R. 59-62) and not by the efforts of plaintiff. The Court denied the motion on the specific ground that under the Federal Rules of Civil Procedure a reply is unnecessary unless a counterclaim is filed (R. 62-63).

While the Court was correct as to the content of the rules, he completely overlooked the fact that the rules were not applicable when the pleadings were closed, and under the practice then existing the new matter constituting a defense was not deemed denied but on the contrary stood admitted unless a reply was filed as provided by rule. Thus at the time the motion was made it stood admitted that the sale was made by defendants after April 30, 1949, and without any aid or assistance from plaintiff. In addition the undisputed proof at that time was that defendants had made the sale on May 2, 1949, and that plaintiff had not procured the sale. We believe that on the pleadings and upon the proof, defendants were entitled to summary judgment and that the trial Court committed prejudicial and reversible error in denying the motion.

Plaintiff continued to try her case. She offered no proof at all that she had procured Pickering to purchase the property. On the contrary, she attempted to show by various witnesses that defendants sold the property. All of her witnesses admitted that they didn't know Pickering and that they never had any

contact with him and that Pickering was first called to their attention by defendant Lawrence White. They testified that White asked them to bring in prospects to try to stimulate Pickering's interest and that they did bring in one prospect. However, this prospect made no offer for the property at all and there isn't a shred of evidence that this procedure had any influence at all upon Pickering or upon the ultimate sale. Neither is there any evidence that plaintiff procured the purchaser or was instrumental in any way in promoting the sale.

We intend to discuss the "Authorization to Sell" at greater length at a later point in this brief, but at this point we want to call the Court's attention to that portion which provides for the commission:

"In consideration of the services of said agent in making such sale, transfer, sending me a buyer, advertising or being instrumental in any manner whatever in selling or transferring said property, I agree to pay said agent out of first payment a commission due on total sale price of ten per cent (10%),". (Emphasis supplied).

We believe that a fair reading of the language just quoted would require plaintiff in some manner to be instrumental in selling the property before she would be entitled to collect a commission. She did not make the sale, she didn't send a buyer, there is no evidence that anything she did was instrumental in any way at all in bringing about the sale.

"Procuring a sale" presupposes that the broker first introduce the parties or in some way do some-

thing to bring about the sale. Before she is entitled to recover anything, plaintiff must prove that she has performed her part of the bargain. In this case, whether one consider the authorization or the complaint, plaintiff wasn't to be paid unless a sale was made and unless she procured the sale to be made, or at least did something instrumental toward making the sale.

“To entitle a broker to his commissions, he must accomplish what he undertook to do in his contract of employment, for, as a rule, nothing short of that is sufficient to constitute a performance upon his part. He is never entitled to compensation for unsuccessful efforts. In every case reference must be had to the terms of that particular employment in order to determine whether or not a broker's duties have been performed. A real estate broker properly authorized to sell property may be said to have performed his contract and to be entitled to commissions when he has, in pursuance of his employment and within the time specified therein, procured a purchaser ready, able, and willing to purchase the property on the terms and conditions specified in the contract of employment, unless the principal in the course of the negotiations finds it acceptable to make certain modifications in his original terms and contract with the party produced upon that altered basis.” (8 Am. Jur., Sec. 168, Brokers, p. 1084). See cases there cited and especially *Crowe v. Trickey*, 204 U.S. 228.

“In the absence of a special contract, a broker must be the procuring cause of a sale or transaction in order to be entitled to commissions thereon. Whether the broker is to introduce a

customer or to find or procure one, or whether he is to do these things combined, his duties remain practically the same, as these words are generally used synonymously in the making of such contracts." (8 Am. Jur., Sec. 172, Brokers, pp. 1087, 1088).

"Where a broker instead of procuring a person who is ready, able, and willing to accept the terms his principal authorized him to offer at the time of his employment, procures one who makes a counter offer more or less at variance with that of his employer, the latter is at liberty either to accept the proposed party upon the altered terms or to decline to do so. If he accepts he is legally obligated to compensate the broker for the services rendered, but if he refuses he incurs no liability therefor. In other words if the principal does not see fit to modify his original proposals the broker can lay no claim to his commissions until he produces a person who is ready, able, and willing to accept the exact terms of his principal." (8 Am. Jur., Sec. 176, Brokers, p. 1092).

"The general rule is that if property is merely placed in the broker's hands for sale, or the broker is given a mere right to sell, the owner himself may make a sale without liability to the broker for commissions, provided the broker has not done the work required to earn his commission, and the owner's sale does not directly interfere with his efforts." (8 Am. Jur., Sec. 189, Brokers, p. 1100).

At the close of plaintiff's evidence and in the light of her pleadings, plaintiff had completely failed to prove her case. There wasn't a shred of evidence that

“she was instrumental in obtaining one John Doe Pinkering,” or anyone else “to purchase the property.” On the contrary, all of her evidence disclosed that in nearly ten months’ time she had not secured even one offer for the property at any price. We believe that giving the evidence every intendment in favor of the plaintiff that plaintiff entirely failed to show she was entitled to any commission and that defendants were entitled to directed verdict or to judgment according to motions made at the close of plaintiff’s case (R. 17, 167). We believe the trial Court committed prejudicial and reversible error in denying such motions.

At the close of all the evidence, plaintiff had still failed to prove her case as laid. Even at that time there was no evidence that plaintiff had in any way procured the purchaser or had been instrumental in any way in bringing about the sale. On the contrary, at that time, by undisputed evidence, it appeared that the buyer first became acquainted with the business and that he first learned the business was for sale while working there and that he had no contact with plaintiff and wanted none. Plaintiff’s bringing in a prospect hadn’t influenced his desire to buy. On the contrary, he had already decided to try to buy, and in fact had come to terms with defendant subject to raising the money and subject to the agency’s rights prior to the time the prospect was brought in.² While

²Easter was on April 17 and the buyer was making candy for Easter when the prospect was brought in (R. 170). The buyer agreed upon price and terms with the sellers shortly after the first of April (R. 173).

White and Pickering had agreed on price and terms, the sale was specifically agreed to be subject to Pickering's raising the down payment and subject to the agency agreement which the parties believed expired on April 30. The money wasn't available until May 1 and the sale was made at that time.

At the close of all the evidence there was not a shred of proof that plaintiff had procured a purchaser or that she was instrumental in any way in selling the property. She still had failed to prove by any evidence at all that she was entitled to a commission. We believe that defendants were entitled to a directed verdict or judgment according to their motions made at the close of all the evidence (R. 17, 202) and that the trial Court committed prejudicial and reversible error in denying such motions.

At the close of the trial, plaintiff abandoned her theory of the case that she had procured the purchaser, as pleaded in her complaint, and changed her theory to claim that the "authorization to sell" gave plaintiff an "exclusive agency" and that she was entitled to recover her commission even though defendants made the sale without her aid and even though plaintiff did not procure the sale and was not instrumental therein. Plaintiff at that time contended that the main issue before the Court was as to whether the sale to Pickering was made before or after April 30, 1949, and as to whether defendants acted in good faith in deferring the sale until after April 30.

This change of theory is apparent from a reading of plaintiff's requested instructions (R. 19-22). It is

interesting to note that no such requested instructions mention "procuring of a sale" or efforts expended by plaintiff which were instrumental in consummating the sale. On the contrary, requested instruction No. III specifically states as follows:

"In the present case there is no evidence that plaintiff or her representative, Rentschler, ever dealt with the ultimate buyer, Pickering, during the life of the agreement."

It is apparent that plaintiff realized at the close of the evidence that she had not proved her case as laid and shifted her theory to try to make recovery of her claimed commission. As previously noted, plaintiff neither requested nor was she granted the right to amend her complaint except as to date of sale and as to amount of sale and plaintiff's claim.

We believe that plaintiff, if plaintiff is entitled to recover in this case at all, must recover on the theory outlined by the pleadings and upon which the case was tried, and that she is not entitled to recover on a theory outside the scope of the pleadings, pulled out of the hat, as it were, at the last minute, after she had completely failed to prove her case as made.

The laws of Alaska provide that issues of fact arise from the pleadings.

"An issue of fact arises—

First. Upon a material allegation in the complaint controverted by the answer; or,

Second. Upon new matter in the answer controverted by the reply; or

Third. Upon new matter in the reply, except an issue of law is joined thereon." (ACLA 1949, 55-7-3).

and as to failure of proof provide

"When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof." (ACLA 1949, 55-5-73).

Apparently neither of these sections are supplanted by the Federal Rules of Civil Procedure, except insofar as a reply may not be required.

By general law, plaintiff is precluded from recovering judgment unless she has proved her case within the issues defined by the pleadings.

"The plaintiff in his proof must ordinarily be confined to the cause of action set forth in his declaration or complaint, and must recover, if at all, on the case made thereon. Except for authority given by statute to the court to cure variances by directing an amendment of the pleading to conform to the proof, the code system of pleading and other practice provisions do not, as a rule, affect the principle that the allegations and proof must correspond. Under modern practice, as well as at common law, a plaintiff cannot sue on one cause of action and recover on another. Any other rule would lead to interminable surprises and consequent injustice. This rule has reference not to the form of the action, but to its substance." (41 Am. Jur., Pleading, Sec. 374, p. 550).

“Decrees in equity and judgments at law must have a basis in the pleadings and the evidence. A party’s proof cannot materially vary from his allegations, and the verdict and judgment must respond to the issues as raised by the pleadings. The parties should be confined in their recovery to that to which they are entitled within their allegations. It is not upon the evidence alone, but upon the pleadings and the evidence applicable to the pleadings, that the plaintiff can in any case recover. This seems to be a principle necessary to the due administration of justice in the courts, and its observance is necessary in order to give the judgment the merit of finality of an adjudication between the parties. A judgment upon a matter outside of the issues raised by the pleadings must, of necessity, be altogether arbitrary and unjust, as it attempts to conclude a point upon which the parties have not been heard.” (41 Am. Jur., Pleading, Sec. 381, pp. 555, 556).

“A material variance arises where a party pleads one cause of action or defense and attempts to prove another and different one. It follows that a party must recover, if at all, on the case made by his pleadings, as modified and amplified by his bill of particulars if one is filed. There can be no recovery upon a cause of action however meritorious it may be, or how satisfactorily proved, that is in substance variant from that which is pleaded by the plaintiff, unless an amendment might be made to conform the pleading to the proof of the new cause of action.” (41 Am. Jur., Pleading, Sec. 382, pp. 556, 557).

As we have previously pointed out, we believe that plaintiff wholly failed to prove her case as laid, and

that defendants' motions made at the close of the case should have been granted, and that to submit the matter to the jury on some theory not within the issues made by the pleadings was prejudicial and reversible error.

As above set out, defendant does not admit that the question as to whether plaintiff was entitled to recover on a theory of "exclusive agency" without "procuring the sale" was properly before the trial Court or is before this Court on the issues made by the pleadings. However, without waiving its arguments above made, and in order that defendants' contention on that theory may be before the Court, if the Court should hold we are in error, we respectfully submit that plaintiff is not entitled to recover anything from defendants even on that theory.

The "authorization to sell" (R. 66-68) is an interesting document. Parts of it are absolutely inconsistent with other parts. It seems apparent that plaintiff's agent, Rentschler, in preparing the document must have thrown in something from each of the listing or agency agreements he ever saw with the idea in mind that one of them would be bound to catch the owner.

However, we believe that a fair reading of the entire document, in the light of the law as to interpretation of documents, will show that at best the plaintiff had an exclusive listing, good for sixty days, under which plaintiff would only be entitled to a commission on proof that she procured the purchaser, or at best on proof that she was instrumental in some manner

in making the sale. She would also have been entitled to a commission upon proof that a sale was made by the owner within 60 days after expiration of the agreement to a purchaser "with whom the agent negotiated during the time of the authorization to sell." The authorization is called an "authorization to sell," (confidential listing). In its first paragraph it purports to give the plaintiff "the exclusive sale or transfer of real estate." It is conceded that the property in question was not real estate. In fact, the listing itself shows that the business was conducted on leased property. No consideration is expressed for "the exclusive sale" and no consideration was attempted to be proved in that connection.

Several lines farther down the authorization appoints Clara Eagleson as "my lawful agent."

The next to last paragraph reads as follows:

"I hereby *list said property exclusively with said agent* for a period of 60 days. I agree to pay said agent the commission set forth in this agreement, if a sale is made within 60 days after the termination of this Authorization to Sell, to parties with whom said agent negotiated during the time of the Authorization to Sell." (Emphasis supplied.)

The commission clause reads as follows:

"In consideration of the services of said agent in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner, whatever, in selling or transferring said property, I agree to pay said agent out of first payment a commission due on total sale price of

10% of \$45,000 payable at the office of the said agent."

This clause is the only place in the authorization purporting to be supported by consideration. As previously pointed out, this clause limits the payment of commission to cases where plaintiff was instrumental in making the sale.

Nor does the clause which reads:

"Any change in the price or terms agreed to by me, or in case a sale is made by owner while this agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property."

alter the matter or give plaintiff the right to collect a commission if she doesn't sell the property or create an exclusive right to sell the property in the plaintiff. Since plaintiff is to receive her commission only "in consideration of *services of the agent in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner whatsoever in selling or transferring said property,*" it follows as a matter of course that where she rendered no services in those respects and did not sell the property and was not instrumental in the sale, that she would not be entitled to any commission where the sale was admittedly made by defendants, and where plaintiff has not proved she was instrumental in any manner in making the sale.

If, as we believe, plaintiff was only entitled to a commission upon proof that she made the sale or

was instrumental therein, it would seem to follow that the language "shall work no forfeiture in the commission due said agent in sale or transfer of said property," doesn't tend to show "an exclusive right to sell" in the plaintiff. On the contrary, since plaintiff would only be entitled to a commission upon a sale made by her or in which she assisted, there could be no "forfeiture" of such commission upon a sale by the owner as there would be no commission due in that case.

We submit that in order to properly construe the "authorization" as a whole, and without doing violence to the language, the language

"Any change in the price or terms agreed to by me, or in case a sale is made by owner while this agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property"

should be construed with the language concerning a sale of the property by the owner within sixty days after expiration of the agreement "to parties with whom the agent negotiated during the time of the authorization to sell."

This "authorization" should be construed as a whole, and in a reasonable manner. Any doubt as to the broker's powers under the "authorization" should be construed against her.

"The general principles of law governing the construction of contracts generally are applicable to the construction of a broker's contract of employment. Such a contract should be construed as a

whole, and in a reasonable manner. Any doubt, however, as to the broker's powers thereunder should be resolved against him." (8 Am. Jur., Brokers, Sec. 18, p. 999).

The "authorization" is the work of plaintiff and if its meaning is in doubt it should be construed against her.

"An agreement should be interpreted as a whole and the meaning gathered from the entire context, and not from particular words, phrases, or clauses. In fact the entire agreement is to be considered to determine the meaning of each part. All provisions should, if possible, be so interpreted as to harmonize with each other." (12 Am. Jur., Sec. 241, pp. 772, 773).

"Doubtful language in contracts should be interpreted most strongly against the party who uses it. A written agreement should, in case of doubt, be interpreted against the party who has drawn it. Sometimes the rule is stated to be that where doubt exists as to the interpretation of an instrument prepared by one party thereto, upon the faith of which the other has incurred an obligation, that interpretation will be adopted which will be favorable to the latter. It is said that an instrument uncertain as to its terms is to be most strongly construed against the party thereto who causes such uncertainty to exist." (12 Am. Jur., Sec. 252, p. 795).

It is sometimes said that a person has an inherent right to dispose of his own property and that agreements with brokers in doubtful cases should be con-

strued against any exclusive agency or exclusive right to sell in the broker.

The Court, over the exception of defendants, gave a portion of Instruction No. 4, more particularly set out in defendants' Specification of Errors No. 5. That portion of such instruction assumes plaintiff would be entitled to a commission upon a sale made within sixty days after April 30 if plaintiff would have negotiated with Pickering but for the acts of defendants. The authorization does not justify such instruction. The commission was to be paid upon a sale made after April 30 by the owner only if it was made to parties with whom the agent negotiated during the time of the authorization to sell. Plaintiff never at any time negotiated with Pickering. She could have contacted him at any time. She claims that White said Pickering was allergic to real estate agents or had an aversion to them and that she should not talk with him. This is emphatically denied by White. In any event, and whatever the reason, plaintiff made no effort at all to contact Pickering. She apparently preferred to sit back and do nothing. If White didn't sell the property, she was out nothing. If he did, she would come in and claim the commission she had failed to earn in ten months' time.

This authorization didn't bind plaintiff to do anything. She could work upon the sale or not as she saw fit. She admitted upon her testimony that any expenses incurred or work done were expenses of doing business and that she was entitled to a commission only if she made the sale (R. 147).

There was no concealment here by defendants. Plaintiff knew White was dealing with Pickering. She even claims she knew what offer had been made. She didn't sell the property, she never received an offer, she never tried to contact Pickering. She didn't earn any commission even under her belated theory of the case.

Suppose, for the purpose of argument, that the authorization created an exclusive agency with the effect claimed by plaintiff. Can it be said to follow that the extension granted by Lawrence White revived the exclusive agency several months dead? We believe not. No consideration was given. Plaintiff already had the prospects. She represented that she thought she could sell the property if given another three weeks. Defendants were willing to let her sell if she could. The undisputed evidence is that negotiations with Pickering during April were specifically contingent upon plaintiff's right to sell the property if she could. She didn't. She didn't even get an offer at any price. To allow her a commission in any amount would be to pay her for performing an agreement she didn't perform and would be a gross injustice to defendants.

Rule 50 of the Federal Rules of Civil Procedure, subsection (b) provides as follows:

“Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised

by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Defendants moved for judgment notwithstanding the verdict under that rule (R. 42-43). We believe that we have shown that plaintiff failed to prove her case and that this motion should have been granted. We believe its denial was prejudicial and reversible error. There was and is no evidence before the Court authorizing a judgment for plaintiffs and against defendants.

Defendants believe one other matter is worthy of consideration. Plaintiff in her testimony contended that the parties reached a new agreement as to commissions, based on a sale to Pickering at a figure above \$30,000. She claims she offered to accept \$2,000 as full settlement of her commission if White could

get Pickering to pay more than \$30,000 and that White accepted the proposition and promised to pay on that basis (R. 141, 154). We believe we have demonstrated that under the evidence and under the issues framed by the pleadings plaintiff earned no commission and is not entitled to anything, but if we are held to be wrong, we believe plaintiff's recovery should be limited to the \$2,000 she claims she was to get under the modified agreement.

Dated, Anchorage, Alaska,
March 30, 1951.

Respectfully submitted,
DAVIS & RENFREW,
EDWARD V. DAVIS,
Attorneys for Appellants.

No. 12,592

IN THE

United States Court of Appeals
For the Ninth Circuit

LAWRENCE A. WHITE and ERMA R. WHITE,

Appellants,

VS.

CLARA M. EAGLESON,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

BRIEF FOR APPELLEE.

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U. S. COURT OF APPEALS

Subject Index

	Page
Jurisdictional statement	1
Statement of the case	1
Summary of argument	6
Argument	7

Point I.

Under the terms of her contract with appellants, the appellee was entitled to be paid her commission on the sale of the business. The contract was unambiguous, and there was ample evidence to support the verdict of the jury.....	7
--	---

Point II.

The Court was correct in denying appellants' motion for judgment on the pleadings, or "summary judgment". The answers contained no new matter requiring a reply, even under the Alaska Code. The Federal Rules of Civil Procedure, governing the trial, obviated any possible necessity for a reply	16
---	----

Point III.

There was no variance between the pleadings and the proof, as alleged by appellants. All issues were fully and fairly tried, and appellants were neither surprised nor misled ..	21
--	----

Point IV.

The Court accurately and correctly instructed the jury on the law of the case, and the instructions as a whole, fully and fairly presented the issues to the jury	25
Conclusion	28

Table of Authorities Cited

Cases	Pages
Automobile Insurance Co. v. Springfield Dyeing Co., Inc. (CCA 3rd, 1939) 106 F.(2d) 204.....	18
Balabanoff v. Kellogg, et al. (CCA 9th, 1940) 118 F.(2d) 597	23
Bethel v. Preston (Wash. 1930) 290 Pac. 224.....	13
Black v. Teeter, et al., I. A. 561 (1902)	23
Brown v. Jones, 3 P.(2d) 768 (1931)	20
Claire v. Blackfoot Waterworks, Ltd. (Ida. 1924) 228 Pac. 326	10
Colorado Life Co. v. Steele (CCA 8th, 1939) 101 F.(2d) 483	26
Confer Bros. v. Colbreath (Minn. 1921) 183 N.W. 524.....	10
Daggs v. Phoenix National Bank, 177 U.S. 549 (1900).....	17
Dickinson v. P. J. Hooker Co. (Ohio 1926) 155 N.E. 573....	10
Donahue v. Reiner Co. (R.I. 1925) 127 Atl. 359, 360.....	9
Genske v. Christensen (Wis. 1926) 208 N.W. 467	13
Globe Liquor Co., Inc. v. San Roman (CCA 7th, 1947) 160 F.(2d) 800	22
Goodyear Fabric Corp. v. Hirss (CCA 1st 1948) 169 F.(2d) 115	28
Granata v. Mothner (Tex. 1931) 44 S.W. (2d) 817, 819....	28
Greene v. Minn Billiard Co. (Wis. 1920) 176 N.W. 239....	10, 13
Harris v. McPherson (Conn. 1922) 115 Atl. 723.....	10, 13
Hill v. Mellon, 3 Ore. 542 (1870).....	24
Hubbard, et ux. v. Olsen-Roe Transfer Co., 224 Pac. 636 (1924)	19
Hughes v. Bickley (Ala. 1921) 89 So. 33	10
John R. Alley & Co., Inc. v. Federal National Bank (CCA 10th, 1942) 124 F.(2d) 995.....	18
Kimmell v. Skelly (Calif. 1900) 62 Pac. 1067.....	13
Krause v. Ferber (N.J. 1918) 103 Atl. 409.....	13
Lewis v. Dahl (Utah 1945) 161 P.(2d) 362.....	12
Lowden v. McClung (CCA 8th, 1936) 80 F.(2d) 694.....	26

TABLE OF AUTHORITIES CITED

iii

	Pages
Mercantile Trust Co. v. Lamar (Mo. 1910) 128 S.W. 20....	11
Peters v. Ruebenhagen (Minn. 1921) 184 N.W. 16.....	8
Roberts v. Graham, 6 Wall. 578 (1867).....	24
Rowe v. Dixon (Wash. 1948) 196 P.(2d) 327.....	28
Stokes v. Brown, 26 P. 561 (1891).....	24
Turner v. Baker (Pa. 1909) 74 Atl. 172, 173.....	15

Statutes

A.C.L.A. (1949) Sections 55-5-71, 55-5-81.....	23
A.C.L.A. (1949) Section 55-5-52.....	20
Hills Annotated Laws of Oregon, Section 96.....	23

Texts

Annotations, 10 A.L.R. 814; 20 A.L.R. 1268.....	8
Bancroft's Code Pleadings, Section 265.....	20
9 C. J. "Brokers" Section 101, P. 622.....	9
Pomeroy's Code Remedies (5th ed.) Section 548.....	20
I Restatement, Agency, Section 14, P. 47.....	27
II Restatement, Agency, Section 385, P. 859.....	27
Williston, Contracts, Section 620 (Rev. ed.).....	15

Rules

Federal Rules of Civil Procedure:	
Rule 8(f)	21
Rule 10(c)	24
Rule 15(b)	21, 22, 23
Rule 86	17

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CLARA M. EAGLESON,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellee accepts generally the Jurisdictional Statement of the appellants, with particular reference to the provisions of New Title 28 U.S.C., Sections 1291 and 1294.

STATEMENT OF THE CASE.

In general, the appellee concurs in the facts as stated in appellants' brief, as supplemented by the following material matters:

On July 7, 1948, the appellants Lawrence A. White and Erma R. White, partners, doing business in Anchorage, Alaska, as the "L W Chocolate Shop", entered into a contract with Clara M. Eagleson, appellee, a licensed real estate broker. (R 65-68.) This contract was labeled an "authorization to sell" and gave appellee the "exclusive sale or transfer" of the business then being operated by appellants. (R 66, 5.) The contract having expired, appellants granted an extension of the agreement until April 30, 1949, by endorsement on the face of the contract. (R 68.) The pertinent portions of this "Authorization to Sell" are as follows:

"I, Lawrence A. White and Erma R. White, of Anchorage, Territory of Alaska, have this day given Clara M. Eagleson, licensed real estate broker, in and for the Territory of Alaska, the exclusive sale or transfer of real estate situated at: Anchorage, Alaska * * *

"I hereby appoint and constitute Clara M. Eagleson as my lawful agent and authorize said agent to enter into written agreement for me and on my behalf and in my name, for the sale of said real estate for the agreed price of \$45,000.00 * * *

"In consideration of the services of said agent in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner, whatever, in selling or transferring said property, I agree to pay said agent out of first payment a commission due on total sale price of 10% of \$45,000.00 payable at the office of the said agent. Any change in the price or terms agreed to by me, or in case a sale is made by owner while this

agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property. Should a deposit secured by said agent be forfeited, one-half hereof may be retained by said agent and the balance shall be paid to me. The agent's share of any forfeited deposit, however, shall not exceed my commission.

"I hereby list said property exclusively with said agent for a period of 60 days. I agree to pay said agent the commission set forth in this agreement, if a sale is made within 60 days after the termination of this Authorization to Sell, to parties with whom said agent negotiated during the time of the Authorization to Sell." (R 5-7, 66-68.)

In furtherance of the objectives of the contract, appellee advertised the sale of the property extensively, both in Alaska and in Seattle, expending \$600.00 and \$700.00 in advertising. (R 136-319.) Her office interviewed more than ten prospective purchasers, and conducted them through the establishment. (R 80-81, 139.)

Around the 10th of March, 1949, Herbert E. Pickering, who had been in business in Fairbanks, became associated with appellants in the business on an arrangement for trading services in return for learning the candy business. (R 168-169.) About the 1st of April, 1949, Pickering and appellants began to discuss the possibility that Pickering might purchase the business. (R 171.) According to their testimony, the appellants and Pickering had agreed upon all terms of the purchase, including the price,

manner of payment and incidental matters, within a few days. (R 172-175, 189, 195.) On April 21, 1949, Pickering and the appellant, Lawrence White went to the offices of their attorneys in Anchorage, gave the attorneys the details of the contract and told them to go ahead and draw it up. (R 177.) A few days later, Pickering and Lawrence White returned to the offices of the attorneys and read the contract over for corrections. (R 178.) Pickering testified that the papers were not signed at that time because the sale was "contingent upon my being able to raise the money", and "* * * above all, not until after the 1st of May * * * because it was my understanding through Mr. White that it would be unnecessary to deal with any agency after the last day of April". (R 171.)

Early in April, 1949, appellee learned that Pickering might be a likely prospect for the purchase of the business. Lawrence White told Carl Rentschler, employed by appellee as a dealer, that Pickering was a prospect but that he would not offer the desired price. Appellant suggested that Rentschler endeavor to stimulate Pickering's interest by bringing other prospects into the store in sufficient numbers to lead Pickering to believe that a sale was imminent. (R 70, 83-84, 160.) Rentschler testified, "and as I stated before, he suggested that were I to get a prospect who would be made to appear very interested in the purchase it might persuade or coerce Mr. Pickering into coming up the additional amount of money that was desired by Mr. White". (R 84.) Thereafter,

Rentschler conducted several prospects through the establishment, at least one of whom was seen by Pickering. (R 83, 170.)

At the same time, appellants specifically instructed both Rentschler and appellee not to attempt to deal with Pickering in any way. (R 71, 73, 80, 141, 153.) As appellee testified, "I said let me talk to Mr. Pickering and let me see if we can include (induce) him to commit himself to a price that will allow for the commission which I agreed to take to help the deal out, and Mr. White replied, 'No, no, no, Pickering won't have anything to do with an agent. He is allergic to them' ". (R 141.) Or as Rentschler put it, "I was told by Mr. White that Mr. Pickering has a definite aversion to real estate agents and that I should not attempt to contact him in any way." (R 71.)

Around April 20, 1949, Rentschler had a conversation with appellant Lawrence White during which Rentschler stated that he had heard that White had sold the business. White denied that any sale had then been made. (R 74, 90.) On April 23, White had a conference with appellee at her office. White again denied that any sale had been made and asserted that "it was peculiar that people know more about my business than I do". (R 140.) White told appellee, "that he had such a low bid from Mr. Pickering that he just couldn't pay a commission and accept the offer." (R 141.) According to appellee, appellant admitted that he had made the deal to sell to Pickering, that the papers were all prepared, and they were

only waiting for the listing to expire. (R 156-157.) In late April, appellant told Wendell Dayton, a former employe, that he was selling the place to Pickering. (R 98-109.) At about the same time, appellant, in a conversation with Oliver J. Easley, admitted that he "was selling" or had "sold" the business to Pickering. (R 124, 127.) This conversation took place at the Alaska Freight Depot, and White said he was just down there picking up some machinery and "helping out the new owner temporarily until he got acquainted with the business". (R 124.) White categorically denied both these conversations. (R 186, 187.)

According to the contract between appellants and Pickering, Pickering was given possession of the property on May 1, 1949, and the contract was notarized and executed on May 2, 1949. (R 113, 117, 120-121.) Appellant refused to pay the commission on the sale demanded by appellee, and this suit followed. (R 74, 3-7.)

SUMMARY OF ARGUMENT.

I. Under the terms of her contract with appellants, the appellee was entitled to be paid her commission on the sale of the business. The contract was unambiguous, and there was ample evidence to support the verdict of the jury.

II. The court was correct in denying appellants' motion for judgment on the pleadings, or "summary judgment". The answers contained no new matter re-

quiring a reply, even under the Alaska Code. The Federal Rules of Civil Procedure, governing the trial, obviated any possible necessity for a reply.

III. There was no variance between the pleadings and the proof, as alleged by appellants. All were fully and fairly tried, and appellants were neither surprised nor misled.

IV. The court accurately and correctly instructed the jury on the law of the case, and the instructions as a whole, fully and fairly presented the issues to the jury.

ARGUMENT.

**UNDER THE TERMS OF HER CONTRACT WITH APPELLANTS,
APPELLEE WAS ENTITLED TO HER COMMISSION. THERE
WAS AMPLE EVIDENCE TO SUPPORT THE VERDICT OF A
JURY.**

Counsel for appellants contends that appellee “offered no proof at all that she had procured Pickering to purchase the property * * * Neither is there any evidence that plaintiff procured the purchaser or was instrumental in any way in promoting the sale”. Appellants’ Brief, 20-21. This is the burden of appellants’ argument in support of Points 2, 3, 5, 7, and 8 of their “Summary of Argument”.

A. Points 2, 3 and 7 of the appellants’ argument relate to the failure of the trial court to grant various motions for judgment, for directed verdict and for judgment notwithstanding the verdict, made by the defendants. We will first discuss these points.

We submit that appellants, throughout their arguments, have attempted to ignore and minimize the

special features of the "Authorization to Sell" involved in this case. This is not an ordinary "listing", or appointment of a broker as agent to sell. It is a special contract, creating what the great majority of courts have termed an "exclusive sale" or "exclusive right to sell". This distinction is of considerable importance in considering the right of the broker to her commissions, and is supported by ample judicial authority.

Generally speaking, if property is merely placed in a broker's hands for sale, or the broker is given a mere right to sell, the owner himself may make a sale without liability to the broker for commissions, provided the broker has not done the work required to earn his commissions (i.e., procured a buyer), and the owner's sale does not directly interfere with his efforts or appropriate the fruits of his labors. See, *Annotations*, 10 A.L.R. 814; 20 A.L.R. 1268. Thus, for example, in *Peters v. Ruebenhagen* (Minn. 1921) 184 N.W. 16, the defendants had merely listed their property with plaintiff and authorized him to procure a purchaser for it, agreeing to pay him a commission, if successful. Before he had obtained a buyer, they sold the property themselves. The court noted that, "there was, in fact, no exclusive right of sale in plaintiff, and defendants were at liberty to make a sale to anyone who might come forward with an offer to buy". 184 N.W. 16, at 17.

An "Exclusive agency" affords the broker little more protection; the owner may not dispose of the property through other brokers, but may still sell

the property himself without any liability to his broker. Thus, in *Donahue v. Reiner Co.* (R.I. 1925) 127 Atl. 359, 360, the authorization to the broker stated, "You are hereby granted the *exclusive agency* for the sale * * * for a period of six months * * *" (emphasis supplied.) This, the court held, did not preclude the owner from selling to a buyer procured by his own efforts. And see, 9 C.J. "Brokers". Sec. 101, p. 622:

"As a general rule a real estate broker who is given an exclusive right to sell property is entitled to a commission on any sale thereof made by the principal either independently or through the efforts of another broker within the time specified in the contract of employment, although the exclusive agent's efforts did not contribute toward the sale, as where the principal himself sells the property without the broker's aid. Where, however, the broker is given merely an exclusive agency, as distinguished from an exclusive right to sell, it merely precludes the principal from employing another broker, and does not preclude him from making a sale himself, without the broker's aid, and in such a case he will not be liable to the broker for commissions regardless of who makes the sale, or unless he sells through another broker."

The "Authorization to Sell" in the present case was clearly an "exclusive right to sell" or "exclusive sale". The contract gave the broker the "exclusive sale or transfer" in so many words; again, it provided that the property was listed "exclusively with said agent for a period of 60 days". (R 5-6.) It went

even further and specifically provided that a sale by the owner during the term "shall work no forfeiture in the commission due said agent * * *" (R 6.) No more specific language was available, or necessary. Under this agreement the broker was clearly entitled to her commission if a sale was made of the property, whether by the owner or anyone else, during the term of the contract.

In *Harris v. McPherson* (Conn. 1922) 115 Atl. 723, the contract, although shorter, was similar: "This is to certify that on this date I have given to Morton S. Harris the exclusive sale of my property, viz: * * * and do agree to pay the said Morton S. Harris 5% of the purchase price at transfer of deed". The owner then sold the property to a purchaser of his own procuring. The court found that this contract gave the broker the exclusive sale of the property, and affirmed a judgment for the broker for his commission. To the same effect are: *Hughes v. Bickley* (Ala. 1921) 89 So. 33 ("exclusive option or right to purchase or sell * * *"); *Greene v. Minn Billiard Co.* (Wisc. 1920) 176 N.W. 239 ("exclusive authority to sell"); *Confer Bros. v. Colbreath* (Minn. 1921) 183 N.W. 524 ("exclusive right to sell"); *Dickinson v. P. J. Hooker Co.* (Ohio 1926) 155 N.E. 573 ("exclusive right to sell"); *Claire v. Blackfoot Waterworks, Ltd.* (Ida. 1924) 228 Pac. 326 ("exclusive right to sell").

Was there a sale during the term of the contract? This question was fairly submitted to the jury by the instructions of the court (R 32), and we submit

that there was ample evidence in the record to support a finding by the jury that a sale had actually been made during the term of the authorization, the formal execution of the sales contract being postponed to May 1 in order to avoid the payment of a commission. White and Pickering practically admitted as much. (R 157, 171, 175-6, 198.) They had prepared the contract of sale and deed, gone over it, and left it to be signed on May 1, with the express purpose of avoiding the payment of a commission. (R 171.) In this respect the case is remarkably similar to that of *Mercantile Trust Co. v. Lamar* (Mo. 1910) 128 S.W. 20, where the evidence disclosed that an agent of the broker had mentioned the listed property to the man who subsequently became the purchaser. Before the listing had expired this prospect told the agent that he had bought a home but was not at liberty to disclose what house it was until a later date. The owner admitted the sale of the property but said he purposely did not sell it until the day after the expiration of the listing period so that he would not have to pay the broker a commission. The owner introduced into evidence a written agreement to sell dated the day after the expiration of the listing and a deed dated the same day. There was evidence that the abstract of title had been ordered a few days earlier. The court held that whether or not there had been such a sale as would entitle the broker to his commission was a question which should be submitted to the jury. The court said:

“* * * Neither do we accede to the proposition that if defendant had entered into a definite

agreement with Reinberger by which defendant agreed to sell the property to the latter and his wife, and they agreed to buy it, this was not a sale which would entitle plaintiff to his commission because not evidenced by an instrument in writing. If such an agreement was made prior to the termination of plaintiff's agency on May 29, and the execution of a deed was deferred merely for the purpose of evading liability to plaintiff for a commission, the contract of sale was so far effective as to entitle plaintiff to a verdict * * * The instrument by which plaintiff was appointed agent would be defeated in one of its main provisions if a complete agreement might have been reached by defendant and the Reinbergers, and yet liability to plaintiff be avoided by postponing the formal consummation of a sale until its agency expired. Such an interpretation would relieve defendant from the duty to observe good faith in keeping the agreement with plaintiff." But see, *Lewis v. Dahl* (Utah 1945) 161 P.(2d) 362.

B. There having been a sale, within the meaning of the law, prior to May 1, the appellee was entitled to her commission under the terms of the authorization. As noted by appellant in his brief (p. 21), the broker was to receive a commission for her services, "in making such sale, transfer, sending me a buyer, *advertising or being instrumental in any manner whatever* in selling or transferring said property, * * *" (R 6, emphasis supplied.) There was no denial of the fact that appellee advertised the property extensively throughout the period of her agency. (R 136-7, 139.) The advertising was productive; more

than 10 prospects were interviewed and conducted through the premises. Such services and advertising are ample consideration for the payment of commissions under such a contract; there is no lacking element of "mutuality". *Krause v. Ferber* (N.J. 1918) 103 Atl. 409; *Kimmell v. Skelly* (Calif. 1900) 62 Pac. 1067; *Genske v. Christensen* (Wis. 1926) 208 N.W. 467; *Harris v. McPherson*, supra; *Hughes v. Bickley*, supra; *Greene v. Minn Billiard Co.*, supra.

And, further, there was ample evidence from which the jury might conclude that the efforts of appellee and her associate, Rentschler, had been "instrumental" in promoting the purchase of the property by Pickering. "There is more than one way to skin a cat." (Old Saying.) Appellant Lawrence White himself had solicited appellee and Rentschler to bring "interested buyers" into the place of business during April in order that Pickering "might think the property were being sold out from under him". (R 70, 83-84, 160.) Rentschler cooperated with appellant in this scheme, marching three prospects through the establishment. (R 83.) From what appellant later told appellee, this effort was evidently successful in getting Pickering to raise his price from \$30,000 to \$35,000. (R 141, 154, 161.) The jury might well have determined that such indirect methods, used by the appellee, had been "instrumental" in persuading Pickering to close the deal with appellants. In *Bethel v. Preston* (Wash. 1930) 290 Pac. 224, the question was whether the broker had "produced" the ultimate purchaser. The broker had not dealt with the pur-

chaser directly, but instead had worked hard on other prospects, feeling that the purchaser would buy to protect his own interest at such point as it might appear that someone else was about to close a deal. The owner was aware of the broker's plan, and when it succeeded, sold to the purchaser without the broker's knowledge. The court said:

“* * * but whether the agency was exclusive or not, neither Patterson nor the respondent, when they had well known for seven or eight months that Mr. Miller was the broker's principal objective and that he (the broker) with respondent's consent and approval was working upon Miller by indirect methods, had any right, as soon as Miller began to show the promised interest, to disregard what had been done and assume because appellant had not actually talked price and terms to Miller that therefore appellant had not produced him as a purchaser.” 290 Pac. 224, at 225.

So, in the present case, appellants cannot ignore the efforts of appellee in “boosting” Pickering, successfully performed at appellants' request.

C. Appellants argue at some length that the “Authorization to Sell” contains inconsistencies and ambiguities and must therefore be construed against the appellee as the person responsible for it. (Appellants' Brief 29-33.) We submit that the authorization is clear and unambiguous, and was easily understood by the parties, the trial court and the jury. Appellants quite obviously understood that they were liable for the payment of a commission if a sale took

place to anyone prior to May 1, whether the purchaser was obtained by the appellee or not. On cross-examination, appellant, Lawrence White, testified, "I told Mrs. Eagleson that she had the exclusive on it until April 30th and I would not sell to anyone". (R 198.) He and Pickering postponed signing the papers when they were ready and corrected, until the day after the agency terminated because "it would be unnecessary to deal with any agency after the last day of April". (R 171.) Appellant further understood that his right to sell without payment of a commission was subject to the "60 day" clause:

"Q. Mr. White, you understood, did you not, that this contract covered a sale made during a period of 60 days after the termination of the contract if such a sale was made to any person with whom the agent, Mrs. Eagleson, had dealt?

"A. Yes, sir." (R 192.)

Appellants *may* have entered into a bad bargain when they signed this contract. They evidently did not think it too bad, as at one time they recognized the value of appellee's services and offered to pay her \$2,000 on account of her work. (R 141, 155-6.) Be that as it may, the mere fact that parties have made an improvident or imprudent bargain will not lead a court to make unnatural implications or artificial interpretations or write a new contract for the parties. Williston, *Contracts*, Sec. 620 (Rev. Ed.). For a pertinent example, see *Turner v. Baker* (Pa. 1909) 74 Atl. 172, 173:

"It is true in some of our cases, where the parties had executed a contract in which it was ex-

pressly covenanted that the brokers should be paid a stipulated commission in the event of a sale within the time specified, no matter whether it was effected by the broker or by the principal, or by any other person, it was held that the commission could be recovered when the sale was made, and that it was immaterial who made it. These cases announce no new rule of law. They are simply declaratory of a fundamental maxim, which is that parties are bound by the terms of their own contract. If an owner of real estate chooses to make a contract with a broker, in which it is stipulated that the broker shall have the exclusive right to sell the property within a specified time, and that he shall be entitled to receive a certain commission if a sale be made within the time designated, no matter who makes it, he is bound by its terms, and cannot be relieved from a bad bargain because his agreement may have been foolish or improvident."

This language might well be applied to the contract in the present case.

THE COURT WAS CORRECT IN DENYING APPELLANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, OR "SUMMARY JUDGMENT". THE ANSWERS CONTAINED NO NEW MATTER REQUIRING A REPLY, EVEN UNDER THE ALASKA CODE. THE FEDERAL RULES OF CIVIL PROCEDURE, GOVERNING THE TRIAL AND THIS APPEAL, OBVIATE ANY POSSIBLE NECESSITY FOR A REPLY.

Appellants contend that the answers contained new matter to which appellee was required to reply under the provisions of the Alaska Code of Civil Proce-

dure. They contend that the trial court erroneously denied appellants' motion for judgment on the pleadings or "summary judgment". That motion was grounded upon appellants' failure to reply to the so-called new matter and upon the testimony of appellee's first witness.* The appellants contend that the Alaska Code should have been applied to the motion.

A. The Alaska Code of Civil Procedure requires that when an answer contains "new matter", the failure to reply is available on a motion for judgment on the pleadings. The Federal Rules of Civil Procedure became applicable in the District Court for the District of Alaska before the time of the trial of the case and the trial court applied these rules to the motion. Rule 86 of the Rules provides:

"They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work an injustice, in which event the former procedure applies."

Thus, under the rule, a former procedure governs only where to apply the Federal Rules of Civil Procedure would not be feasible or would work injustice. And, before applying a former procedure, the

*The trial court correctly disregarded this testimony because only the pleadings should be considered upon motion for judgment on the pleadings. *Daggs v. Phoenix National Bank*, 177 U.S. 549 (1900).

trial court must find that to do otherwise would be unjust. *John R. Alley & Co., Inc. v. Federal National Bank* (CCA 10th, 1942) 124 F.(2d) 995; *Automobile Insurance Co. v. Springfield Dyeing Co., Inc.* (CCA 3rd, 1939) 106 F.(2d) 204. In the first cited of those two cases, the court at page 999 said:

“The purpose is evident in the new rules to extend their application, unless for good cause shown, to all proceedings, whether brought prior to their effective date or thereafter. It has been held that the trial court must *specifically find* that the application of the new rules would be unjust in order for one complaining of their application to raise the question on appeal.” (Emphasis supplied.)

In the present case, appellants did not even attempt to show that to apply the Federal Rules would be unjust.

B. Assuming, arguendo, that the trial court improperly exercised its discretion and that the Alaska Code of Civil Procedure should govern, the answers did not, in fact, contain any new matter. In the complaint (R 3-7) it was alleged that plaintiff and defendants had entered into a contract according to the terms of which plaintiff was employed to procure a buyer for a certain business, that the contract was in force until the 30th of April, 1949, that during April, 1949, plaintiff was instrumental in obtaining a buyer, and that in April, 1949, defendants sold the business. The contract itself was by reference made an exhibit to the complaint. (R 5-7.) The answers

(R 7-12) contained denials of the allegations contained in the complaint and also alleged that the contract expired before the sale, that the plaintiff was not instrumental in interesting the buyer, and that the sale was made between the buyer and sellers after the contract had expired and without plaintiff's assistance. Those allegations in the answer were purely evidentiary and argumentative and created no new issues. Thus, evidence to support the allegation of the answers that the contract *had expired before the sale* would be admissible under the issues framed by the allegations of the complaint that the contract *did not expire until April 30* and *that the sale was in April*, and the denial of those allegations by the answer. Similarly, evidence to support the allegation that the plaintiff was *not* instrumental in interesting the buyer would be admissible under the issue of fact framed by a denial of the allegation of the complaint that plaintiff *was* instrumental in procuring a buyer. And, similarly, evidence to support the allegation that the sale was made by direct negotiations between the buyer and the sellers after the contract had expired and without any effort on behalf of plaintiff would be admissible under the issues framed by the denials of the complaint's allegations that the contract was in effect throughout April and that plaintiff was instrumental in procuring a buyer. For a similar pleading problem, see, *Hubbard, et ux. v. Olsen-Roe Transfer Co.*, 224 Pac. 636 (1924).

Furthermore, the matter was not new because it purported to show that the alleged claim never ex-

isted, rather than to admit its existence and defeat it. *Brown v. Jones*, 3 P.(2d) 768 (1931).

“That is not new matter the purpose of which is to show the alleged cause of action never did exist, and that material allegations of the complaint are not true.”

Bancroft's Code Pleadings, Sec. 265.

“The new matter of the codes admits that all the material allegations of the complaint or petition are true, and consists of facts not alleged therein which destroy the right of action, and defeat a recovery.”

Pomeroy's Code Remedies (5th ed.) Sec. 548.

C. Assuming, arguendo, that the answers contained new matter and that the Alaska Code of Civil Procedure governed, no replies to the answers were required because the defense containing the so-called new matter was not separately stated and thus was improperly pleaded. A part of Sec. 55-5-52 A.C.L.A. 1949 provides:

“The defendant may set forth by answer as many defenses and counter-claims as he may have. They shall be separately stated and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished; provided that the defendant shall not be required to admit in his answer any liability or indebtedness to the plaintiff in order to be permitted to plead a counter-claim.”

THERE WAS NO VARIANCE BETWEEN THE PLEADINGS AND THE PROOF, AS ALLEGED BY APPELLANTS. ALL ISSUES WERE FULLY AND FAIRLY TRIED, AND APPELLANTS WERE NEITHER SURPRISED NOR MISLED.

Appellants contend that appellee committed a material variance and failed in her proof by changing the theory of the case from that framed by the pleadings. The contention is that a variance occurred when the court admitted evidence to show that there was a sale before April 30th, and when the court admitted evidence to show that defendants prevented appellee and her representative from dealing with the buyer, Pickering. (Appellants' Brief, 25.) The pleadings, it is said, merely raise one issue of fact and that is as to whether the plaintiff was instrumental in procuring a buyer. Ibid.

A. The Federal Rules of Civil Procedure were in effect in the District Court for the District of Alaska before this trial commenced. Those rules deal specifically with the subjects of variance and amendment of pleadings to conform with proof. Rules 8(f) and 15(b) are pertinent. Respectively, they provide:

“Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.”

“Amendment to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to

amend does not effect the result of the trial of these issues. If evidence is objected to at the trial on the grounds that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

The latter rule requires that objection be made to the admission of evidence which is not within the issues framed by the pleadings and, further, that the objecting party satisfy the court that such admission would prejudice him in maintaining his action. *Appellants failed to meet either requirement.* In *Globe Liquor Co., Inc. v. San Roman* (CCA 7th, 1947) 160 F.(2d) 800, as obiter dictum, the court said:

"Of course, where on the trial evidence is admitted without objection which proves a case different from that alleged in the complaint, we may consider the pleadings amended to conform to the evidence thus introduced." Federal Rules of Civil Procedure, rule 15(b), 28 U.S.C.A. following Section 723c.

B. Assuming, arguendo, that the Alaska Code of Civil Procedure should govern any questions concerning variance, there is no error. Provisions of that

code require that objections to variances be made at the trial and that the trial court find that the objecting party is misled.

“Variance. When material: Proof: Ordering Amendment: No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merit. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just.” Sec. 55-5-71 A.C.L.A. 1949.

Sec. 55-5-81 A.C.L.A. 1949 is also pertinent.

“Disregard of Defects. The court shall, in every stage of the action disregard any error or defect in the pleadings which shall not affect the substantial rights of the adverse party.”

The interpretation of these provisions has been settled in Alaska for many years. *Black v. Teeter, et al.* 1 A. 561 (1902). In *Balabanoff v. Kellogg, et al.*, (CCA 9th, 1940) 118 F.(2d) 597, evidence was introduced and the cause was tried and submitted on a theory other than that framed by the pleadings. On appeal this court noted the similarity between the above quoted provision from the Alaska Code and Rule 15(b) of the Federal Rules of Civil Procedure. The court found no error. The Oregon courts have similarly construed the Oregon statute (Hills An-

notated Laws of Oregon, Sec. 96) from which the Alaska statute was taken verbatim, in *Hill v. Mellon*, 3 Ore. 542 (1870), and in *Stokes v. Brown*, 26 P. 561 (1891). In *Roberts v. Graham*, 6 Wall. 578 (1867) the court said:

“The objection of variance not taken at the trial cannot avail the defendant as an error in the higher court, if it could have been obviated in the court below; * * *

“In the case before us the plaintiff was entitled to be apprised of the objection if it were intended to be relied upon, at an earlier period in the progress of the trial. The court would doubtless have permitted an amendment if deemed necessary, upon such terms as the interests of justice seem to require.”

The defendant's right to make the objection was waived and concluded by the delay.

C. The evidence which tended to show that the sale to Pickering occurred before April 30 was not outside the issues framed by the pleadings, because the “Authorization to Sell” was made an exhibit to the complaint and it provided that, “any change in the price or terms agreed to by me, or in case a sale is made by owner while this agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property”. (R 6.) Rule 10(c) of the Federal Rules of Civil Procedure provides:

“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes”.

The evidence which tended to show that appellants prevented plaintiff from dealing with the buyer, Pickering, was also admissible under the issues framed by the pleadings, tried and submitted.

THE TRIAL COURT ACCURATELY AND CLEARLY INSTRUCTED THE JURY ON THE LAW, AND THE INSTRUCTIONS AS A WHOLE FULLY AND FAIRLY PRESENTED THE ISSUES TO THE JURY.

The appellants submitted a number of requested instructions, twelve in all, but took no exception to the failure of the trial court to give any of the requested instructions. (R 22-28.) Counsel for appellants assisted the court in straightening out the language of the instructions, and made formal objection only to a portion of one instruction. (R 221-222.)

The portion of the instruction which the appellants found objectionable was as follows:

“You are also instructed that if you find that the plaintiff would have negotiated with said Pickering but for the acts or conduct, if any, of defendant Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date.”

This language must, of course, be considered in connection with the balance of the instructions, and particularly in connection with the balance of instruction No. 4, of which it was only a part. The appellants argue in their brief that “the authorization

does not justify such instructions'', because appellee never at any time negotiated with Pickering. (Appellants' Brief, 34.)

The only objections made at the trial were:

“(1) That is not the law; and

(2) That there is insufficient evidence to warrant such an instruction.” (R 222.)

Admittedly, neither appellee nor Rentschler ever dealt with the ultimate buyer, Pickering, during the life of the agreement. However, the reason why there were no such negotiations is apparent from the record: *appellee and Rentschler were expressly directed by appellant not to deal with Pickering or attempt to contact him in any way.* (R 71, 73, 80, 141, 153.)

True, this testimony and much other evidence was denied by the appellants, and certain explanations were made by the appellant Lawrence White and by the witness Pickering. The facts were fairly submitted to the jury, and the jury was under no obligation to believe either their testimony or the explanations. Questions of fact arising on disputed testimony must be deemed resolved in favor of the party obtaining verdict. *Lowden v. McClung* (CCA 8th, 1936) 80 F.(2d) 694. Appellee is entitled to have this court regard as true all competent evidence in the record most favorable to her, and to give her the benefit of every favorable inference reasonably drawn therefrom. *Colorado Life Co. v. Steele* (CCA 8th, 1939) 101 F.(2d) 483.

As the court properly instructed the jury, “* * * the law requires the utmost good faith on the part of the principal toward his agent. Each owes to the other the duty of performance according to the terms of their agreement.” (R 32.) As the *Restatement* points out: “A principal has the right to control the conduct of the agent with respect to the matters entrusted to him” I *Restatement, Agency*, Sec. 14, p. 47. Furthermore,

“(1) Unless otherwise agreed, an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform.

“(2) Except where he is privileged to protect his own or other’s interest, an agent is subject to a duty not to act in matters entrusted to him on account of the principal contrary to the directions of the principal, even though the terms of the employment prescribe that such directions shall not be given.” II *Restatement, Agency*, Sec. 385, p. 859.

And, consider the following illustration given:

“In consideration of \$50.00 paid by A, P appoints A as his sole agent for a period of a month, to sell Blackacre on commission. Thereafter within the month, P directs A not to make statements concerning the qualities of Blackacre which are customarily made by honest real estate brokers. A is under a duty to P not to make such statements, but P is subject to liability for the breach of his implied agreement not to give unreasonable directions.” *Ibid.*

The duty of appellant under the terms of the authorization to sell in this case, having given appellee the exclusive right to sell the property, was to refer all prospective purchasers to her. *Granata v. Mothner* (Tex. 1931) 44 S.W. (2d) 817, 819. Certainly, the appellant should not be permitted to avoid payment of a commission by definitely directing the broker not to take action which would have entitled the broker to a commission. Such was the effect of appellants' orders to the appellee in the present case.

The trial court gave a general charge to the jury, which fully covered all of the law involved in the proceedings. Considered as a whole, the instructions of the court fairly and substantially presented to the jury the issues to be decided, and the judgment should not be disturbed on appeal. *Goodyear Fabric Corp. v. Hirss* (CCA 1st, 1948) 169 F.(2d) 115; *Rowe v. Dixon* (Wash. 1948) 196 P.(2d) 327.

CONCLUSION.

The appellants and appellee entered into the contract concerned in this case voluntarily, lived under it, and should be required to abide by it. Appellants should not be permitted to avoid payment of appellee's commission by subterfuge, or by resort to artificial refinements and technicalities finding no support in the applicable law. The case was fairly tried

and submitted and the judgment below should be affirmed.

Dated, Anchorage, Alaska,
May 31, 1951.

Respectfully submitted,
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Of Counsel.



No. 12,592

IN THE

United States Court of Appeals
For the Ninth Circuit

LAWRENCE A. WHITE and ERMA R. WHITE,
Appellants,

VS.

CLARA M. EAGLESON,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

APPELLANTS' REPLY BRIEF.

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Subject Index

	Page
A. Summary of argument	1
B. Argument	2
I. The "authorization to sell" created at most an "exclusive agency"	2
a. Summary of law.....	3
b. Argument as to construction.....	7
c. Interpretation by parties	10
II. No sale was made prior to May 1, 1949.....	11
III. Appellee was not instrumental in selling the property	16
IV. Appellee was not entitled to deal with Pickering	17
V. What the jury did or did not find cannot be de- termined	18
VI. Pleadings were governed by Alaska law.....	20
VII. Defendants' motion for judgment should have been granted	21
VIII. Plaintiff changed her cause of action after the evidence was closed. She failed in her proof and this is not a case of variance.....	21
IX. Jury should have been instructed to find for de- fendant	22
X. The judgment should be reversed with directions	22

Table of Authorities Cited

Cases	Pages
Bethel v. Preston, Wash. 1930, 290 Pac. 224.....	16
Confer Bros. v. Colbreath, Minn. 1921, 183 N.W. 524.....	2
Donohue v. Reiner, R. I. 1925, 127 Atl. 359.....	3
Elson v. Sanders, Wash. 1922, 209 Pac. 842.....	6
Granata v. Mothner, Texas 1931, 44 S.W. (2d) 817.....	18
Greene v. Minn, Wis. 1920, 176 N.W. 239.....	3
Harris v. McPherson, Conn. 1922, 115 Atl. 723.....	3
Lewis v. Dahl, Utah 1945, 161 Pac. (2d) 362, 160 A.L.R. 1040	13
Mercantile Trust v. Lamar, Mo. 1910, 128 S.W. 20.....	13
Roberts v. Harrington, Wis. 1918, 169 N.W. 603.....	3, 4
Stensgaard v. Smith, Minn. 1890, 44 N.W. 669.....	5
Sunnyside v. Bernier, Wash. 1922, 205 Pac. 1041.....	5, 6
Waterman v. Boltinghouse, Cal. 1890, 23 Pac. 195.....	6
Wozniak v. Siegle, Ill. 1922, 226 Ill. App. 619, 64 A.L.R. 398	6

Statutes

29-1-12 Alaska Compiled Laws Annotated 1949	14
58-2-2 Alaska Compiled Laws Annotated 1949	14

Texts

64 A.L.R. 410	7
160 A.L.R. 1048	14

No. 12,592

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LAWRENCE A. WHITE and ERMA R. WHITE,
Appellants,

VS.

CLARA M. EAGLESON,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

APPELLANTS' REPLY BRIEF.

SUMMARY OF ARGUMENT.

I. The main question for consideration is the interpretation of the authorization to sell. Such authorization did not create an exclusive right to sell but at most created an exclusive agency to sell.

II. No sale was made until after May 1, 1949.

III. Appellee was not instrumental in selling the property.

IV. Appellee never negotiated with the buyer and was not entitled to negotiate with him.

V. The jury verdict might have been based on any one of several alternatives and accordingly it can't

be said that certain propositions have or have not been determined by jury finding.

VI. Pleadings were closed prior to applicability of the Federal Rules and under applicable Alaskan Law a Reply should have been filed.

VII. The motion for judgment on the pleadings or for summary judgment should have been granted.

VIII. Plaintiff changed her whole cause of action after the evidence was in. This case involves a failure of proof, not a variance.

IX. Under the evidence and the exhibits, the only instruction necessary was an instruction of a verdict for defendants.

X. The judgment should be reversed with instructions to enter judgment for defendants.

ARGUMENT.

Appellants believe that the first question to be decided is the meaning of the "Authorization to sell", Plaintiff's Exhibit 1.

Appellants are willing to concede that many Courts allow a broker a commission where he had exclusive authority to sell, even though the sale be made by the owner without aid from the broker, where the sale is made in the applicable period and where the agreement specifically requires such payment. *Confer Bros. v. Colbreath* (Minn., 1921), 183 N.W. 524, cited by appellants, is a good example of that rule.

Appellee in her brief concedes that a mere listing of property for sale with a broker does not entitle the broker to a commission where the owner makes the sale unaided. She further concedes that an agreement granting the broker "an exclusive agency" does not entitle the broker to a commission where the owner makes the sale unaided by the broker. *Donahue v. Reiner Co.* (R.I., 1925), 127 Atl. 359, cited by appellee, fairly presents this view.

The cases are split as to whether an exclusive sale agreement is not in fact an exclusive agency agreement.

Harris v. McPherson (Conn., 1922), 115 Atl. 723, cited by appellee, recognizes this split in authority and the dissenting opinion in that case argued that the words "Exclusive sale" are ambiguous as applied to the authority of a broker and that in a simple contract devoid of unusual promises by the broker ought not to be construed as conferring unusual authority, especially when, as in that case (also in the case at bar) it was found in a printed form prepared by the broker and submitted to the owner for signature.

Each case is decided on the language of its particular agreement. Thus the case of *Greene v. Minn Billiard Co.* (Wis., 1920), 176 N.W. 239, cited by appellee, specifically distinguishes *Roberts v. Harrington* (Wis., 1918), 169 N.W. 603, decided by the same Court two years before.

It seems to be a general rule that before the Courts find that an agreement is such as to entitle the broker to a commission where the property is sold by the owner unaided by the broker, the language used must be clear and unequivocal requiring that ruling and negating the right of the owner himself to sell without being liable for the commission. Each of the cases cited by appellee so holding are specific in that regard and each of such cases read by the writer of this brief were based on clear and unequivocal agreements.

As samples of cases holding that the agreement did not entitle the broker to a commission where the owner sold the property unaided by the broker appellants call the Court's attention to the following:

Roberts v. Harrington (Supreme Court Wisconsin, 1918), 169 N.W. 603, above cited. The agreement there gave the agent "the exclusive sale" of the property for a certain period. The owner sold the property during that period. Judgment by the lower Court for the broker was reversed with directions for dismissal on the merits.

The Court in construing the language "exclusive sale" held that such language does not preclude sale by the owner without liability for a commission unless "*the language is so clear and unambiguous as not to bear any other.*" "the words 'exclusive sale' may well mean 'exclusive agency to sell,' the idea being that the owner shall employ no other agent".

The opinion of that Court, at page 604, might very well have been written as applying to the case here under consideration. We invite the attention of the Court to the same.

Stensgaard v. Smith (Minn., 1890), 44 N.W. 669, involved a writing which in many ways is similar to Plaintiff's Exhibit 1. It was contained mostly in a printed form. It purported in one sentence to give the broker "the exclusive sale of the property" for a specified period. In another section the owner agreed to pay a commission to the broker "*for his services rendered in the selling of*" the property. It was signed by the owner but not by the broker. In that case, as in the one we are here considering, the broker advertised and solicited customers. The owner sold the property himself during the period covered by the agreement. Lower Court judgment for the owner was affirmed. The Court held the writing good as a present and revocable grant of authority to sell, but held there was no consideration and no mutuality of obligation to sustain the alleged exclusive nature of the right to sell. The Court further found that commission was to be paid only in case of a sale by the broker. He didn't sell and he earned no commission.

Sunnyside Land & Investment Co. v. Bernier (Supreme Court of Washington, 1922), 205 Pac. 1041, construed an agreement set out in full in the opinion at page 1042. The agreement there construed is much more favorable to the broker than the one we have here. It purports to be based on a valuable consid-

eration. The broker there specifically agrees to endeavor to sell the property. The commission clause provides that the owner "will *in case of sale* or, if said second party is instrumental in finding a purchaser pay * * * etc." The owner sold the property himself during the contract period. Judgment for the owner rendered by the lower Court was affirmed.

The Court held that the words "exclusive right to sell" amounted to no more than an "exclusive agency to sell" and did not preclude a sale by the owner himself without making him liable to pay a commission. The Court further held that the language as to commissions "in case of sale" rendered the owner liable to pay a commission only in a case where the buyer was procured by the broker and not liable where the broker had nothing to do with the sale.

The *Sunnyside* case, above digested, was specifically followed in the case of *Elson v. Sanders* (Washington, 1922), 209 P. 842.

See, also, *Waterman v. Boltinghouse* (Cal., 1890), 23 Pac. 195, where the broker had an agreement granting "an exclusive right to sell." The owner sold the property during the period. Judgment for the owner was affirmed. The Court intimates without so deciding that a suit for damages for breach of contract might lie, but finds no commission due.

See, also, *Wozniak v. Sicgle* (Ill., 1922), 226 Ill. App. 619, digested 64 A.L.R. 398. There the agreement in one paragraph designated the broker as "ex-

clusive agent." In a later paragraph it provided that if the property was sold either through the broker or any other person that the commission would be paid. Judgment given the broker for the commission by the lower Court was reversed. The Court held that the two sections were inconsistent one with the other unless the agreement was construed as granting a sole agency only. The Court further held that if the words "any other person" were to be construed as applying to the owner that the phraseology of the instrument all taken together would be conflicting. The Court further held that the law requires that all the contents of an agreement must be considered and weighed and coordinated in construing an instrument, that the particular agreement was one of exclusive agency and not one granting an exclusive power of sale. Therefore, the owner had the right to sell without obligating himself to pay a commission.

Attention of the Court is invited to 64 A.L.R. 410, Headnote III, Section A, Subsection 1, entitled "Contract conferring exclusive right to sell, sale by the owner, purchaser not produced," together with cases cited in the annotation.

Was the agreement, Plaintiff's Exhibit 1, as extended, such as to give the broker a right to a commission even though the property was sold within the applicable period where it was sold without the aid of the broker? In other words, did this agreement give the broker the exclusive sale of the property? We believe it is clear that it did not.

As previously pointed out, the agreement was the work of the broker and in case of doubt is to be construed against her.

Appellee claims in her brief (page 9) that the agreement "was clearly an exclusive right to sell" or "exclusive sale." She argues that it so provides in so many words, and it does if one takes those words out of context. However, the only place the words "exclusive sale or transfer," or anything similar, appears in the agreement is in the fourth and fifth lines thereof and such words specifically refer to a sale of real estate. The property here involved admittedly is not real estate. Appellee's agent Rentschler in his testimony (R. 75) admitted that no real estate was involved and that that portion of the contract was surplusage.

Appellee also claims that the agreement provided that the property was "*listed exclusively*" with the broker. Again that is true. An exclusive listing is nothing more than an exclusive agency. As previously shown, appellee concedes that an exclusive agency does not require payment of a commission if the property is sold by the owner without the aid of the broker. It merely prohibits sale through another agent or broker.

Appellee says that the agreement is clear and unambiguous. (Brief 14.) We submit that the two sections of the agreement hereinabove quoted are inconsistent one with the other. If appellee had exclusive right to sell then she could recover a commission even

though she did nothing to promote the sale. If she had merely an exclusive listing or an exclusive agency then she is not so entitled to recover any commission without proof that she was instrumental in making the sale.

Appellee claims that the agreement provides that a sale by the owner "shall work no forfeiture in the commission due the agent" and so it does, but as pointed out in appellants' opening brief (p. 32) that clause could very well mean that any sale by the owner to a party procured by the broker, or to a party with whom the broker had negotiated during the term, or a sale in which the broker was instrumental would work no forfeiture of the commission. In fact, a proper construction of the entire agreement would find that is exactly what it did mean. Also, as pointed out in our opening brief (p. 32), appellee was only entitled to a commission on certain conditions. Except those conditions were fulfilled there was to be no commission and if there was no commission there could be no forfeiture of commission.

By the specific terms of the agreement, commission is to be paid only in consideration of the broker doing one or more of the things mentioned therein. If we were to construe this agreement as an exclusive sale agreement as argued by appellee then the language in the agreement which reads:

"In consideration of the services of the agent in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner

whatever in selling or transferring said property, I agree to pay said agent * * * a commission * * * etc.”

is meaningless and that is the only language in the agreement which provides for any commission.

It seems to us that the language above quoted specifically negatives any intention of the parties to make an exclusive sale agreement where the broker would be paid even though she did not perform as there set out.

We believe that the written agreement is ambiguous, that it does not specifically negative the right of the owner to sell without subjecting himself to pay a commission, and that in any case it should be construed against the broker as being no more than an exclusive agency to sell.

Appellee claims that all the parties understood the agreement as obligating appellants to pay a commission regardless of who made the sale. In support of that contention she quotes from page 198 of the record where appellant Lawrence White testified that “I told Mrs. Eagleson that she had the exclusive on it until April 30th and I would not sell to anyone.” That language is only part of the testimony and should be construed with the other testimony of the witness as part of the same cross-examination. (See R. 198, 199, 200.)

Q. And you knew that if you sold during the month of April you would have to pay a commission to Mrs. Eagleson?

A. Providing a client came through her.

Q. Whether or not the client came through her if you sold in the month of April?

A. If she was instrumental in getting the party to buy, yes, sir.

Q. Didn't you understand that you had to pay a commission during the month of April regardless of whether she had anything to do or not?

A. No. (See p. 200 two-thirds of the way down.)

Along this line we believe it is significant that appellee herself apparently considered the agreement as merely creating an exclusive agency until after she had failed to prove that she was instrumental in making the sale.

We believe we have shown that the agreement which is the subject of this suit should not be interpreted as granting an exclusive right to sell to appellee. If that is correct then the time of sale is unimportant unless appellee has shown that she was instrumental in selling the property or that the property was sold within sixty days after April 30 to one with whom appellee negotiated between April 8 and April 30.

We contend that there is no competent evidence of a sale prior to May 1 by anyone and no competent evidence of a sale at any time to any person with whom appellee negotiated.

The most that could be said of the testimony of Easley and of Dayton was that White had told them

he was selling, not that a sale was made. (R. 100, 101, 124, 127.)

Appellee also testified that White told her on April 23 that he had sold the place (R. 156), but taking her whole testimony together it is apparent she must have meant that White told her he had an offer which he would have to accept unless she could get a better one. (See R. 141, 150, 151, 152, 154, 156, 157, 158.) He specifically told her he would have to sell to Pickering if she didn't get a better offer.

This conversation was some time after appellee claims the property was sold and two days after the contract to sell between the owners and Pickering had been prepared.

The only direct evidence as to when the property was sold is that of White and of Pickering. Both testified and it stands absolutely undisputed that the consideration was finally arranged and was paid on May 1 and the draft of contract previously drawn was signed then. The acknowledgements showed that the contract was signed May 2. No proof of any kind was offered to the contrary.

Appellee claims that an actual sale was made in April but that papers were not signed until May to give it an appearance of a sale in May to beat her out of her commission. There is absolutely no evidence to support that contention. It seems that appellants were more than fair with appellee. Even though she had no exclusive sale agreement the nego-

tiations with the buyer were specifically made subject to a prior sale by appellee at any time prior to May 1. That evidence is undisputed. Appellee made no effort to rebut it.

Appellee cites *Mercantile Trust Co. v. Lamar* (Mo., 1910), 128 S.W. 20. That case is apparently a minority decision but in any event it can be distinguished from this case in that the owner there sold to the customer interested by the broker.

The case of *Lewis v. Dahl* (Supreme Court of Utah, 1945), 161 Pac. 362, 160 A.L.R. 1040, is cited by appellee but not otherwise mentioned. In that case the broker had an agreement whereby the owner specifically agreed to pay a commission if he sold the property during the term. The purchaser admittedly negotiated with the owner during the term of the broker's agreement. The conveyance was made after expiration of the agreement. The broker claimed that a sale was actually consummated during the term but completion was delayed as a means of beating him out of his commission. The broker did not procure the purchaser. Judgment for the broker by the trial Court was reversed with directions to enter judgment for defendants.

Evidence in that case was much stronger for the broker than here.

The Court said:

“Until the purchaser is bound, there is no sale, and the length of time during which negotiations are conducted which finally lead up to the sale,

is immaterial. Until or unless there is a sale within the term of the listing agreement there can be no right to a commission."

See, also, *Annotation*, beginning at page 1048, of 160 A.L.R. and the cases there cited on this point.

The general statute of frauds of Alaska is 58-2-2 *Alaska Compiled Laws Annotated*, 1949, and reads as follows:

"58-2-2. In the following cases an agreement is void unless the same or some note or memorandum thereof expressing the consideration be in writing and subscribed by the party to be charged or by his lawfully authorized agent:

First. An agreement that by its terms is not to be performed within a year from the making thereof."

Appellee claims that a complete sale was agreed upon between the owner and the purchaser before May 1, and that the contract of sale had been drawn following that agreement before May 1 and signed on May 1 or 2. That agreement admittedly was not to be performed within a year from its making. Such an oral agreement even if proved would have been void and unenforceable.

The Alaska statute of frauds as to sales of personal property is 29-1-12, (1) *Alaska Compiled Laws Annotated*, 1949, and reads as follows:

"29-1-12. (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforce-

able by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

Admittedly the goods in question was personalty and of a value of more than \$500. No consideration was given until May 1. Under the terms of the contract (see Exhibit 2, see appellee's brief 6), possession of the property was given May 1. No note or memorandum was signed by either party, until May 1.

Under these sections it seems clear that even though an agreement had been reached in April it was unenforceable and void as against the buyer.

We feel that there was no issue to go to the jury on the question of time of the sale.

In her brief, appellee claims she was entitled to a commission even though her contract was not exclusive and even though sale may not have been made in April.

First, she claims she advertised the property and that the advertising was productive since more than ten prospects were conducted through the premises. We submit that the record shows that appellants were not interested in conducting prospects through the premises. They wanted to make a sale. Conducting

an average of one prospect per month through the premises did not promote a sale. The advertising didn't produce a single offer at any figure. (R. 80, 84, 152-153.) Admittedly, appellee did not make a sale, or transfer. She did not send a buyer. She did advertise but got no prospects ready to buy the property. We believe the word "advertise" used in the agreement is modified by the words "or being instrumental in any manner whatever" which follow it and that fruitless advertising does not entitle plaintiff to a commission.

Secondly, appellee claims she was instrumental in selling the property because she says she stimulated Pickering to buy. She says she was working by indirect methods to that end and got Pickering to raise his price.

It is interesting to note that in *Bethel v. Preston* (Wash., 1930), 290 Pac. 224, cited by appellee, the prospect in question was a prospect procured by the broker, called to the attention of the owner by the broker, and known by the owner to be the broker's principal prospect.

In this case there is no evidence at all that any actions of the broker stimulated Pickering at all. If one believes Pickering, the entire sale had been negotiated between the owner and himself early in April, subject to his raising the money and subject to a prior sale by appellee. Both parties who knew anything about it testified that there was no haggling over price

or terms and that the sale was specifically contingent on Pickering raising the down payment and upon prior sale by appellee.

It is true appellee claims that White told her Pickering had offered \$30,000 and that her efforts must have been productive in getting him to go to \$35,000, but that testimony is pure speculation and is contrary to all the evidence. If, as appellee claims, the sale terms were complete prior to April 20 and that a written draft of agreement was made at that time which showed a sale at \$35,000, then appellee must have been mistaken as to the conversation which she says took place three days later, on April 23. There is no evidence at all that the three prospects conducted through the premises in April or the one prospect seen by Pickering "showed sufficient interest so that Pickering might think the property was being sold out from under him" as Rentschler explained the deal. In fact, only one of such prospects showed any interest and no information concerning that prospect was given White until April 23, after appellee claims the property was sold. There is no evidence that Pickering ever was advised of any interest by any prospect produced by appellee.

Appellee says there is ample evidence that her acts were instrumental in making the sale. We say there is no such evidence.

Third, appellee claims she is entitled to recover because appellants wouldn't let her deal with Pickering. We say that under the terms of the contract appellee was not entitled to deal with Pickering.

We believe it is evident that the Court erred in instructing the jury in giving the portion of Instruction IV excepted to by appellants. Under the contract, as previously shown, appellee at best had an exclusive agency contract. The owner had no duty to refer his prospect to her. The contract didn't provide that the broker was to get a commission if a sale was made within sixty days to a buyer procured by the owner and as to whom the broker had been warned away. There is no fraud here. The broker was advised at all times that Pickering was White's prospect even before the extension was granted.

Granata v. Mothner (Texas, 1931), 44 S.W. (2d) 817, cited by appellee, involved an exclusive right to sell. The language as to referral of a purchaser is dictum as the case was reversed on other grounds.

At several places in her brief appellee asserts that the jury found in favor of appellee, that there was ample evidence to go to the jury and that disputed questions of fact have now been decided.

It is difficult to determine what the jury did or did not find. The verdict was a general one for the plaintiff. The Court in Instruction Number II said the burden was on plaintiff to prove that plaintiff was instrumental in procuring a purchase by Pickering. As we have shown, such a finding would be surplusage if the agreement was one of exclusive sale.

In the next paragraph of the same instruction, the judge said that the principal question for the jury was as to whether the property was sold during the

life of the agreement. That would only be important as a principal question in case the agreement gave an exclusive sale. Otherwise, the question as to instrumentality of plaintiff in making the sale would be at least of equal importance.

In Instruction III the Court specifically instructs the jury that the agreement was one of exclusive sale and that defendants were liable for the commission if they sold the property during the life of the agreement or within sixty days after April 30, 1949 to any person with whom plaintiff had negotiated prior to that date. At that point the question as to whether appellee was or was not instrumental in making the sale became of no importance whatsoever. A verdict for plaintiff could mean that the jury found either that the sale was made by defendants before April 30 or that it was made after April 30 to one with whom plaintiff had negotiated.

To complicate matters still further, Instruction IV set forth a contention that if the property was actually sold before April 30 but the transaction was given the appearance of being a sale after that date and if plaintiff was dissuaded from negotiating with Pickering for the purpose of defrauding plaintiff out of her commission, then the verdict should be for plaintiff for \$3,500. Then comes the language to which appellants excepted, which was to the effect that if plaintiff would have negotiated with Pickering except that she had been warned away by White, then plaintiff would be entitled to a commission if the sale were

made within 60 days after April 30. The jury could very well have decided that White requested Eagleson not to talk to Pickering, which he admitted, that Eagleson might have talked to Pickering except for White's request, and that since the sale was admittedly made not later than May 1, which was less than 60 days after April 30, that plaintiff was entitled to a verdict. In that case the jury was not required to pass upon either the instrumentality of plaintiff or the time of the sale to find for the plaintiff.

It is our belief that the agreement was not one of exclusive sale. We believe there is no competent evidence that plaintiff was instrumental in making the sale. We believe there is no evidence to justify a finding that a binding sale was made prior to May 1. The evidence is all to the contrary and the Court completely ignored the statutes of frauds. We believe appellant White was within his rights in requesting the broker not to contact Pickering and that such request does not have the legal effect of allowing plaintiff to claim she would have negotiated with Pickering if White had not requested her not to do so and we believe it certainly does not follow that she was entitled to recover upon a sale being made after April 30 as though she had negotiated with a purchaser with whom she had no dealing.

Several technical matters have been raised by appellee.

We claim that the pleadings in this case and admission of the parties under such pleadings were

closed prior to the extension of the Federal Rules to Alaska and that the pleadings were governed by Alaska law. We admit that procedure at the trial was governed by the Rules.

We claim that under Alaska law and under proper interpretation of Plaintiff's Exhibit 1, that the allegations of the answer to the effect that defendants themselves had sold the property without the aid of the broker was new matter which required a reply. Technically, it should have been set forth in separate paragraphs, but failure of plaintiff to object waived that defect. We believe the Court should have granted the motion for judgment on the pleadings or for summary judgment.

We believe plaintiff failed to prove her case. Submission of the matter to the jury on another theory wasn't a variance. It was an entirely new cause of action. In fact, it was three new causes of action. No one in the case had any inkling that plaintiff was claiming an exclusive right to sell or that she was claiming a sale in April in fact but in May in appearance, or that she was claiming the right to commission even on a sale after April 30 until she requested her instructions. The Court himself during the examination of plaintiff's last witness recognized that the material question was as to whether plaintiff had procured a purchaser. (R. 137.) The suit as laid was for commission. The suit as it went to the jury was for damages for breach of contract or for fraud or something else.

We recognize that pleadings are not all important and are only a means to an end, but we believe the number of questions before this Court in this matter show conclusively that pleadings and a somewhat consistent theory of the case are much to be desired.

Appellants infer that since no objections as to instructions were taken except as to part of Instruction IV, objections may not now be made. That is true, of course, and we are not making further objections now, but we believe that under a proper interpretation of the authorization and giving the evidence its every lawful intendment in appellee's favor, that there was no competent evidence to go to the jury and accordingly the only instruction necessary was one directing verdict for appellants.

It is our sincere belief that nothing in the evidence or in the law justifies a verdict or a judgment in favor of appellee and we respectfully submit that the judgment should be reversed with directions to enter judgment for defendants.

Dated, Anchorage, Alaska,
July 11, 1951.

Respectfully submitted,
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